IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1144

Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,

Plaintiffs-Appellants,

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, et al.,

Defendants-Respondents.

JURISDICTIONAL STATEMENT

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Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,

Plaintiffs-Appellants,

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A.

Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota,
Defendants-Respondents,

and

Lisa Garcia, Christine Garcia and Julie Anne Garcia, minors, by their father and mother and natural guardians, Ernest Garcia and Lupe Garcia, and Ernest Garcia and Lupe Garcia, individually; Robert E. Slater, III, Joseph F. Slater, Susan C. Slater, Thomas S. Slater, Timothy P. Slater, Sheila M. Slater, and Shannon C. Slater, minors, by their father and natural guardian, Robert T. Slater, Jr., and Robert E. Slater, Jr., individually; Donna Wheaton, a minor, by her mother and natural guardian, Emma Hilliard, and Emma Hilliard, individually; and Leigh Ann Spears and Lisa Spears, minors, by their father and natural guardian, William Spears, and William Spears, individually,
Defendant Intervenors-Respondents,

and

David and Julaine Wachholz, individually, and Amy, Michael and Laurel Wachholz, minor children, by their parents and natural guardians, David and Julaine Wachholz; James P. Larkin, individually, and Ann, Matthew, Thomas, Mary, Cecilia, Joan, Eileen, Gregory, John and Margaret Larkin, minor children, by their parent and natural guardian, James P. Larkin; Willis Weiberdink, individually, and Joan, Jan, and Wesley Weiberdink, minor children, by their parent and natural guardian, Willis Weiberdink; Robert E. and Rose Mary Geist, individually, and Robert E., Jr., Rose Mary, Christopher, and Larry Geist, minor children, by their parents and natural guardians, Robert E. and Rose Mary Geist,
Defendant Intervenors-Respondents.

JURISDICTIONAL STATEMENT

STATEMENT OF THE CASE

Chapter 396 is the latest in a series of laws adopted by the Minnesota Legislature designed to support financially the education of pupils in sectarian and other nonpublic schools. The Act provides for the distribution of educational aids to nonpublic schools and their students. The Act became effective July 1, 1975. Section 8 of Chapter 396 provides for annual appropriations in the amount of $12,000,000.

Appellants filed their complaint in this action on January 14, 1976, challenging the validity of the new law under the First Amendment of the United States Constitution.

The three-judge panel heard the case on September 28, 1976, on the briefs, arguments of counsel and a factual record consisting of a comprehensive stipulation of facts and certain exhibits, to-wit: exhibits incorporated by the Stipulation; an affidavit sustaining the responses to plaintiffs' questionnaire; a memorandum from the office of the Attorney General approving a procedure whereby private schools ordered materials directly without approval of the local district or prior requests by students; an affidavit of Rosemary Sommerville regarding her inspection of 10% of the involved districts; an affidavit of Leo Bernat regarding the reliability of the results of plaintiffs' survey as to questions not submitted into evidence.

On November 29, 1976, the District Court announced its decision and opinion upholding the constitutionality under the Establishment Clause of those Sections of the Act which are operative.

QUESTIONS PRESENTED

1. Does state law violate the Establishment Clause of the First Amendment by providing instructional materials for use in church-related elementary and secondary schools when the law purports to provide only materials which are available for and of benefit to individual students, but permits the use and possession of materials to be given to the schools and provides items which had previously been purchased by parents and can only be used practicably by teachers and groups of students?

2. Does the actual operation of Chapter 396 have the primary effect of advancing religion or impermissibly entangling the State in religious affairs?

3. Does a state violate the Establishment Clause of the First Amendment by providing auxiliary services and equipment for use in church-related schools when such aids are formally requested by students, equipment is provided for use by students, a state board is required to designate items capable of being used for religious instruction, and the auxiliary services provided are limited to such services as are provided to public school students?

JURISDICTIONAL STATEMENT

Appellants appeal from that part of the order of the United States District Court for the District of Minnesota (hereinafter the "District Court") entered by a three-judge District Court on November 29, 1976, upholding the constitutionality of Minnesota Statutes §123.932 and §123.933 and refusing to enjoin defendants from effectuating Minnesota Statutes §123.-932 through §123.937, which provide state funds for the implementation and support of a program providing teaching aids for the use of children attending nonpublic schools including sectarian schools.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented. The following are the interests of the parties to this appeal:

1. The individual appellants are citizens and taxpayers of Minnesota and the United States;

2. The organizational plaintiffs are parties interested in maintaining the separation of church and state whose members include numerous citizens and taxpayers of Minnesota and the United States;

3. The defendants are required by the laws of the State of Minnesota to implement all or part of Chapter 396 and are sued solely in their capacities as officials of the State of Minnesota;

4. Intervenor defendants are students or parents of students who attend nonpublic schools and represent the interests of pupils attending sectarian and non-sectarian schools and their parents.

The final order appealed from was entered by the District Court on November 29, 1976, upholding the constitutionality

of Chapter 396 and denying an injunction against its effectuation. Notice of appeal to this Court was filed in the District Court on January 13, 1977.

Jurisdiction of the direct appeal is conferred on this Court by 28 U.S.C. §1253 and *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); and *Meek vs. Pittinger*, 421 U.S. 349 (1975).

STATUTES INVOLVED

The text of Chapter 396, Minnesota Statutes §123.931 through §123.937 is set forth in the Appendix hereto, A. 19-25. The regulations implementing Chapter 396, Minnesota Regulations, Department of Education §740 through §742 are set out *infra*, A. 25-28.

OPINION BELOW

The order and opinions of the District Court are not reported. They are set out *infra*, A. 1-16.

JURISDICTION

Pursuant to Title 28 United States Code §§1343(3), 2201, 2202, 2281, 2284, and Title 42 United States Code §1983, plaintiffs filed their complaint in the District Court on January 15, 1976, alleging that Chapter 396 of the Laws of Minnesota, 1975, Minnesota Statutes §123.931 through §123.937 (hereinafter "Chapter 396") violates the First and Fourteenth Amendments of the United States Constitution by effecting an establishment of religion. The complaint demanded preliminary and permanent injunctions against the effectuation of the Statute as well as other relief.

On June 18, 1976, pursuant to 28 U.S.C. §2284, a three-judge court was convened to hear and decide the law suit.

THE QUESTIONS ARE SUBSTANTIAL THE ISSUES PRESENTED ARE OF NATIONWIDE CONCERN

There is a striking similarity between state aid programs for sectarian schools and their students in numerous states including New York, New Jersey, Vermont, Illinois, Ohio and Pennsylvania. Such plans, when approved by federal courts, will be copied by legislatures across the nation, particularly where such plans achieve results prohibited by *Meek v. Pittinger*, 421 U.S. 349 (1975) and *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.C.N.J. 1973), *aff'd* 417 U.S. 961 (1974). The Minnesota assistance plan is similar to other state programs of questionable First Amendment consequence. If the Minnesota plan is adopted by other states, it is probable that hundreds of millions of dollars in public aids will be distributed to religious enterprises in contravention of the First Amendment.

INSTRUCTIONAL MATERIALS RATIONALE OF THE DISTRICT COURT

Except for the treatment of textbooks as instructional materials, the materials distributed pursuant to Chapter 396 are substantially identical to those in *Meek* and *Marburger*. The religious character of the private schools selecting the materials is predominately the same in all three cases. The District Court reasoned that instructional materials would be constitutionally provided under the same conditions applied to the loan of textbooks in *Meek*. A.13. The court subsumed that the opinion in *Meek* "objected solely to the form of these programs, the loan of materials directly to the schools," A.13, concluding that a change in the technical form of ownership of the mate-

rials made the loan constitutionally permissible. This reasoning directly conflicts with prior holdings of this Court for the following reasons:

1. This Court in *Meek* and *Marburger* objected not only to the form of ownership of the materials but to the potential diversion of the materials; and under Chapter 396 materials could not be and are not loaned in the manner textbooks were loaned in *Meek* and *Board of Education v. Allen*, 392 U.S. 236 (1968).

2. A change in the form of ownership does not alter the primary beneficiary of the program.

DIVERSION

This Court noted that the result in *Meek* was directly supported if not compelled by its affirmance of *Marburger*:

> "excessive entanglement of church and state would result from attempts to police use of materials and equipment that were readily divertible to religious uses. *Marburger* at 38-39. This Court's affirmance of *Marburger* was a decision on the merits entitled to precedential weight." 421 U.S. at 366-67, n. 16.

The part of the *Marburger* opinion referred to is:

> "Most of these items obviously can be used with equal facility in the teaching of religious studies as well as they can be used in the teaching of secular, non-ideological subjects. To see to the enforcement of the legislative intent — given the obvious adaptability of supplies, instructional materials and 'equipment' — a constant, continuous review and control of the manner in which the supplies, materials and equipment were utilized would have to be undertaken. It is this necessity then, to enforce the limitation on the use of funds that will forever demand a state involvement continuing an intolerable government presence in the affairs of the Church." 358 F. Supp. at 38-39 (D.C. N.J. 1973), *aff'd* 417 U.S. 961.

Thus, the inherently adaptable materials of Chapter 396 could never be practicably or constitutionally subjected to the policing method which prevented the misuse of less divertible textbooks in *Allen* and *Meek*.

Rather than implementing obviously unconstitutional controls, Minnesota chose to loan easily divertible materials virtually without restraint. No statute, regulation or administrative procedure requires the examination of materials for sectarian content. In fact, regulations require officials to process and transmit pupil requests and then to purchase and distribute books based upon the processed requests, Minn. Regs. Ed. §741(b)(1), (2). Administrators thereby are denied discretion to reject a request and are relegated to a purely ministerial role. In practice, not even rubber stamping is required because private schools may order materials directly on behalf of the local district. See Memorandum from the Office of the Attorney General.

Actual administration is chaotic. Plaintiffs' questionnaire demonstrates that in a large majority of districts, books are not read to determine the religious content, nor do standards for secular content exist. Plaintiffs' Affidavit, A.34, 35, Questions 5, 7 and 8. The District Court found the questionnaire indicated "that few of the districts have any established book lists or other formal screening methods". A.11. But at the same time, the Court then found that the statute "presumes an initial determination by public officials that the materials in question are suitable for use in public schools and therefore 'secular' in nature". A. 11-12. This contradictory presumption

raises serious First and Fourteenth Amendment questions that can only be answered by this Court.

The only limitations on Chapter 396 materials are that they be secular, neutral and non-ideological, A.11, Minn. Stat. § 123.932, subd. 1, and that a standard of secular content is said to be set by the requirement that books be suited for use in public schools. A.9. Minn. Stat. § 123.932. Both secularity and availability for use in public schools were required in the materials programs invalidated in *Meek*, 421 U.S. at 355 and *Marburger*, 358 F. Supp. at 31.

In *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), the Court rejected the argument that the Act was constitutional because the aids were required to be "secular, neutral and non-ideological," 413 U.S. at 478; the aids were an integral part of the teaching process; and "no attempt is made under the statute and no means are available to assure that internally prepared tests are free of religious instruction." 413 U.S. at 478. Moreover, availability for use in public schools does not assure that materials would be either secular or incapable of diversion when used in sectarian schools. The Bible is suitable for use in public schools. *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963). The Court took notice of plaintiffs' argument that many books, pamphlets and other materials approved for use in public schools contain accounts of religious events and religious philosophies. A.14, n. 5. See also Minneapolis Public Schools List of Approved Materials.

The District Court found these limitations adequate and declared that the Supreme Court

> "has never stated that an elaborate system of screening and prior approval is necessary in order to guarantee that an aids scheme will not have the primary effect of advancing religious activity". A.12.

The Court reasoned that materials could be provided constitutionally under the same conditions applied to textbooks in *Meek* and *Allen*. A.12-13. However, the textbook programs in *Meek* and *Allen* bear little resemblance to the unpoliced Minnesota program. Although true textbooks are less subject to diversion, the *Marburger* opinion directly infers that some procedure must be instituted to police the loan of textbooks. The Court, in *Allen*, which was constitutionally indistinguishable from *Meek*, 421 U.S. at 359, assumed that public school authorities have a duty to determine whether each book loaned is secular or religious and that such duties will be honestly discharged under the law.[1] *Allen*, 392 U.S. at 245. *Meek* involved a rigid procedure for the approval of textbooks. Books distributed to private school students had to appear on a list of books approved by a state board which promulgated standards in the form of guidelines. 421 U.S. at 379. The procedure upheld in *Allen* was not as strict, but each book loaned was approved by a public school official who was required to screen the contents of the textbook. The Court in *Levitt* found that the reason textbook aid is distinguishable from other forms of aid is that "a textbook's content is ascertainable but a teacher's handling of a subject is not." 413 U.S. at 481. Standards for determining secularity and religiosity of content were set forth in state guidelines. 392 U.S. at 245. Justice Douglas discussed some of the standards in his dissent. 392 U.S. at 254-270; Guidelines for Administering New York Textbook Law, 5 N.Y. Education Dept. 6/28/67 p. 1 (Part of the record in *Allen* and quoted in 79 Yale L. Rev. 111, 121 [1969]).

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[1] This is directly implied by the statement, "Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular or religious books or that they will not honestly discharge their duties under the Law." *Allen* 392 U.S. at 245.

The Court should have followed *Committee for Public Education v. Nyquist*,

> "[i]n the absence of guarantees that the state aid derived from public funds will be used exclusively for secular, neutral and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 412 U.S. at 780.

In most cases, only private school personnel police the distribution of materials. In discussing auxiliary aids, the Court in *Meek* rejected the proposition "that it was sufficient for the state to assume that teachers in church related schools would succeed in segregating their religious beliefs from their secular educational duties". 421 U.S. at 369.

SUBSIDIZATION OF RELIGIOUS ENTERPRISES AND THE CHILD BENEFIT THEORY

The sole remaining difference between the Minnesota program and the instructional materials program rejected in *Meek* and *Marburger* involves the technical form of ownership of the materials. However, change in the form of ownership does not alter the adaptability of materials, the core of *Marburger*, nor does it prevent the subsidization of religious education found in *Meek*. In his dissent, Judge Larson recognized the "form of the loan to be a mere fiction created in an attempt to avoid constitutional objections to a scheme that benefits the private schools primarily and the students only incidentally". A.14. He reasoned that "the characterization of materials that are traditionally and effectively useable in a group setting or with group access as being loaned to students is a triumph of form over substance". A.15. The District Court found that

schools may be given the use and possession of the materials. A.13. In practice, use of many of the materials including globes, large charts and maps and audio-visual materials by teachers as well as by students would be unavoidable. Essentially, the statute establishes what Judge Larson called "a Byzantine scheme for the distribution of property rights in reuseable instruction materials purchased with public funds". A.15.

Application of the child benefit theory to this type of case has but one precedent, *Wolman vs. Essex*, C-2-75-792 (S.D. Ohio, July 21, 1976) and is directly contrary to the holding in *Norwood v. Harrison*, 413 U.S. 455, (1973). Schools are said not to be aided when assistance flows directly to students in the sense that "they obtain nothing from them [appropriations] nor are relieved of a single obligation because of them". *Cochran v. Board of Education*, 281 U.S. 370, 375 (1930). Consequently, the child benefit theory has been applied only to items that children or parents would be obligated to purchase in the absence of legislation. The Court in *Norwood* explained that

> "[a]ppellees misperceive the child benefit theory of cases decided under the religion clauses of the First Amendment [citing *Cochran* and *Allen*]. In these cases, the Court observed that the direct financial benefit of the textbook loans to students is 'to parents and children—not schools—in the sense that parents and children—not schools—would in most cases be required to procure the textbooks if the state did not' ". *Norwood*, 413 U.S. at 464, n. 7.

In the instant case, neither argument nor evidence was presented to show that parents or children had procured the materials provided by the Act. It is inconceivable that parents

provided globes, audio-visual materials, newspapers for general use or library books.

When the necessary expense of providing learning materials is borne by the State, the economic consequence is to aid the enterprise, *Norwood,* 413 U.S. at 464, in this case a church-related enterprise. See Stipulation ¶8A, A.30.

This Court will give plenary consideration to *Wolman v. Essex* where the court was unable to determine the substantive difference between textbooks, historically provided by the parents, and maps, charts, models, etc. *Wolman,* C-2-75-792 at 12. The District Court upheld Chapter 396 citing this statement in *Wolman.* A.13. Even if children were the primary beneficiaries of the Act, the District Court is still required to examine plaintiffs' arguments concerning diversion, entanglement and equal benefits. The Court in *Nyquist* held that the child benefit theory did not confer a per se immunity from examination of a program and is but one of many factors considered. 413 U.S. at 781. A District Court decision affirmed by this Court explained:

> "[i]n *Allen,* the fact that parents and students were beneficiaries of this aid would not have prevented the Court from striking down the law if it provided for the loan of religious books." *Lemon v. Sloan,* 340 F. Supp. 1356, 1364-65 (1972), *aff'd* 413 U.S. 825 (1973).

The fact that aid was given to parents does not prevent a subsidy from having a primary effect of supporting religious institutions. In *Norwood,* even provision of textbooks to children was found to aid the operation of private schools. 413 U.S. at 464.

ENTANGLEMENT

Aside from three scattered passing references in connection with other topics, the Memorandum Opinion does not reveal whether the District Court scrutinized the entanglement problems raised at length by plaintiffs. Entanglement is one of the three tests courts are bound to examine in cases involving the Establishment Clause. *Roemer v. Maryland Public Works Board,* —— U.S. —— , 96 S.Ct. 2337, 2347 (1976). Lack of thorough scrutiny warrants the attention of this Court.

Three features of the Minnesota program invite impermissible entanglement.

1. Failure to articulate the nature of state-sectarian school relations activates a presumption of entanglement. This Court held that:

> "[t]he state is constitutionally compelled to assure that state supported activity is not being used for religious indoctrination." *Levitt v. Committee for Public Education,* 413 U.S. 472, 480 (1973) (quoting *Lemon v. Kurtzman*; see also *Nyquist,* 413 U.S. at 480).

This Court observed in *Lemon v. Kurtzman,* 403 U.S. 602, 622 (1971), that the history of government grants of continuing cash subsidies have (almost always) been accompanied by various measures of control and surveillance. A District Court in Vermont discerned the same pattern when the direct subsidy is in the form of auxiliary aids or instructional materials. *Americans United for Separation of Church and State v. Oakey,* 339 F. Supp. 545, 549 (D.C. Vt. 1972). The Vermont legislature provided teaching aids similar to those provided by Chapter 396 and failed to specify standards, controls, or parties responsible for implementation of restraints. *Oakey* followed *Levitt, Lemon, Nyquist* and *Tilton v. Richardson,*

403 U.S. 672 (1970), and enjoined further operation of the Vermont Act saying,

> "[t]he actual mechanics of this intrusion by the employees of the school districts into sectarian schools is not spelled out by statute. Presumably the implementation of the plan is left to local districts themselves. The potential, however, for the involvement of the state, through school districts in various religious affairs is not dispelled by its lack of articulation." *Oakey*, 339 F. Supp. at 551.

The inconsistent results in *Oakey* in the instant case stress the necessity for plenary consideration of this case.

2. A localized decision making process magnifies administrative entanglement and political devisiveness. The *Meek* textbook aid program escaped entanglement difficulties by simply having one state-wide board approve books before use in public or private schools. 421 U.S. at 362. In Minnesota, a single item would have to be approved in each local district. The Minnesota law multiplies the number of potential reviews by the 176 districts containing private schools. Such reviews would be required not only of textbooks but of all materials not used in public schools. Local control reduces the expertise developed by the persons reviewing requests. Plaintiffs' questionnaire documents that few districts have developed standards or procedures for reviewing requests. Plaintiffs' Affidavit of Counsel, A.34, 35, discussing questions 5 and 7. The numerous administrative difficulties of uncontrolled and unstructured relations between districts and parochial schools will be aggravated by decisions of elected local school officials which will likely be the subject of political action in concentrated pockets of religious activism. This potential for localized, political-religious discord presents the precise danger

of which this Court warned in *Lemon v. Kurtzman*, 403 U.S. at 622.

3. By providing free secular materials the Act tempts sectarian schools to abandon religious materials of central importance to the teaching mission of the sponsoring churches. See Justice Stevens' dissent in *Roemer v. Maryland Public Works Board*, —— U.S. —— 96 S. Ct. at 2358.

UNEQUAL BENEFITS

Accounting methods result in more valuable textbook benefits accruing to private school than to public school pupils. The per capita funding of programs for private and public school pupils are required to be equal, based on a statewide average. Minn. Stat. §123.933. The expenditure formula for public school students is calculated from expenditure account code numbers 220, 230, 240. Stipulation ¶14, A.13. These accounts are used to report not only state expenditures for student materials but also for textbooks provided for teachers. Stipulation ¶16, A.32.

The accounts also record expenditures for books not benefitting students in the classroom, such as books for general use and books kept in stock or retired to library use. See Exhibit C, Passim, especially Code 220. Code 220 also reports expenditures for certain supplementary textbooks and reference materials funded in part by federal sources. Stipulation ¶15, A.32. The inclusion of federal funding and non-student materials in calculating per capita funding of public schools necessarily dictates that more state funds are spent for materials provided for private school students than for public school students.

The District Court held that the provision of aid was valid only if private school pupils received no more than the same

benefits as are received for public school pupils, and found that benefits may be unequal. A.10. But the District Court asserted that the statute provided on its face for equal benefits and that any accounting deficiencies were "easily remediable", A.10, and merely ordered that the state alter its accounting procedures to reflect only the actual state funds spent for materials provided to public school students. A.10-11. In the two months since the Order was issued, the Department of Education has yet to propose regulations that could "easily" remedy the problem. This Order will take several years to cure the problem, if it can be cured, substantially reduce the funds spent for both private and public education, and require difficult, costly and entangling accounting and inventory control procedures. The scope of such an Order goes beyond the purview of the statute and extends judicial power far beyond the point countenanced by any previous decisions of this Court.

TEXTBOOKS

Minnesota "textbooks" are unlike textbooks under the laws of any other state. In *Allen*, *Meek* and *Wolman*, textbooks had to be the principal or primary source of study material for a given class. Guidelines for Administering the New York Textbook Law 5, New York State Educational Department, 6/28/67, quoted in 79 Yale L. Rev. 111, 129, n. 81 (1969); *Meek*, 421 U.S. at 354; *Wolman*, C-2-75-792, at 8. In all three cases, textbooks and materials are provided under different conditions by separate sections or acts. New York Educational Law § 701; 24 Penn. Stat. § 195 C.E.; Ohio Rev. Code § 3317.-06(a). In *Allen* and *Meek*, "textbooks" was operationally defined by public acts, selective approval being required of local or state officials. *Meek*, 421 U.S. at 361-62, n. 10. Guidelines

further restricted the selection. See Justice Douglas' discussion of restrictions imposed on textbooks in *Allen*, 392 U.S. at 254-269; Department of Education of Pennsylvania Guidelines for the Administration of Acts 194 and 195. Minn. Stat. §123.933 defines and treats textbooks as instructional materials. The District Court found that textbooks were loaned under the same conditions as other materials, title was passed in the same way, standards for insuring the secular nature and use of materials were the same, funds available for all materials including textbooks were calculated together, and the educational value and purposes of the textbooks and other materials were substantially the same. A.12. The District Court did not need to decide whether the provision of textbooks was void for overbreadth because it found constitutional the loan of all instructional materials, arguing the similarity of provisions for textbooks and other materials to find the loan of all materials permissible.

As instructional materials, textbooks are defined to include supplementary books, costs for repair and cartage and even dictionaries. Manual of Instructions for Uniform Accounting for Minnesota School Districts (1972 Revision) P. VI-29, Code 220. See Stipulation ¶13, A.32. The Code reporting costs for textbooks used in the formula designed to equalize private and public school expenditures, records costs for supportive books and booklets, various reference books and dictionaries. Stipulation ¶14, 15, A.32. See also Minneapolis Public School List of Approved Materials (the only such list known in the State). The open definition of textbooks in the Act and regulations thereto merely states that the term includes named items, not that the definition is limited to those items. The only definitional restriction of "textbook" is the boiler-plate circumscription applied to all materials: that they be "such secular neutral

and non-ideological materials as are available and are of benefit to Minnesota public school students" and are "available for the individual use of each pupil in a class or group". Minn. Stat. §123.932, subd. 1. This does not comport with any common definition of textbooks. As the Supreme Court of the State of Illinois said of the term "textbook":

> "[t]he word is popularly understood to describe a book, rather than anything of lesser substantiality or permanence which expounds the principles of a given field of knowledge . . . and which is the basis for a course of study and not a general reference work or reference book on a subsidiary topic . . . a map is not a textbook nor is a collection of maps in an atlas nor is a dictionary." *Beck v. Board of Education of District No. 122*, 27 Ill. App. 3d 4, 325 N.E.2d 640, 644 (1975).

That Court also ruled out supplementary books and materials. This definition casts doubt on the District Court's findings that the loan of textbooks was substantially similar to the programs in *Allen*, *Meek*, (A.12) and *Wolman* (A.13).

In short, the Minnesota definition encompasses not only books that are the core of classroom study, but any supportive book. Each book useable by a class is a textbook. This expansive definition greatly increases the likelihood that textbooks will be used to further religious goals. If a textbook is a principal source of study for a class, it must be of a broad survey nature presenting a self-contained body of facts, organized to treat the secular course, and far more likely than supportive texts to present a balanced and complete view. By contrast, more particularized supportive books are likely to contain a single point of view, not be designed to teach the secular subject, and be more easily adaptable to teach other courses.

Numerous books on limited philosophical, historical and other topics which support a secular course may also support sectarian instruction. Dictionaries could be profitably used in connection with religious courses to look up religious words; and it would be anamolous to prohibit distribution of individual maps while permitting distribution of an atlas. Books not classified as textbooks but provided as instructional materials were impermissible in *Meek* and *Marbur er*. See Act 195 § 1(b) P.S.A. Title 24, § 9-972A, defining instructional materials in *Meek* and *Marburger*. 358 F.Supp. at 34. Moreover, this case is distinguishable from *Allen* and *Meek* because "textbooks" are far more adaptable as discussed previously.

By finding an expense that would otherwise be borne by schools, the state subsidizes religious schools. Prior to the state textbook programs in *Allen* and *Meek*, parents of non public school children had to purchase their own textbooks. There is no evidence that such practice prevailed in Minnesota. In fact, it is improbable that parents provided all supportive books, dictionaries, reference works, and other educational materials.

Finally, the enlarged range of books classed as textbooks raises entanglement questions. In *Allen*, *Meek* and *Wolman*, one or perhaps two textbooks per class would have to be approved since textbooks had to be primary or principal sources of classroom study. When numerous secondary works qualify, there would be more requests to local boards, more reviews, and greater administrative entanglement resulting in political discord. Overburdened boards would be tempted to omit or abandon reviews resulting in the previously discussed advancement.

AUXILIARY AIDS AND EQUIPMENT

The District Court refused to review the parts of Chapter 396 providing equipment and auxiliary services to nonpublic students, Minn. Stat. § 123.934 and § 123.935 respectively, because the Department of Education has no current plans to implement the Sections. A.5. Plaintiffs argued that the *Meek* holding controls regardless of Chapter 396 implementation. Plaintiffs challenge the facial validity of the statute as plaintiffs challenged the statutes in *Meek* and *Wolman* and raise similar issues. In *Wolman*, no part of the statute involved had been implemented. Arguments raised in the *Wolman* jurisdictional statement are applicable to this case. See *Wolman v. Essex*, Jurisdictional Statement at 21-24, 28-29, 32-33. Services and equipment of the kind that would be provided pursuant to Chapter 396 were provided in both Pennsylvania and Ohio, and Minnesota requires services to be provided "in the students' respective schools whenever possible" as in *Meek*. Compare Minn. Stat. § 123.934 and § 123.935 and Act 194 quoted in *Meek*, 421 U.S. at 352-53.

CONCLUSION

Chapter 396 is a convoluted scheme to funnel state aid to sectarian schools with minimal constraint. The District Court used bizarre fictions and elaborate, loosely-drawn statutory language to mask the lax administration and actual effects of the Act. It is a rudimentary legal principle that a statute fair on its face may be void on account of its operation. *Great Northern R. Co. v. Washington*, 300 U.S. 154, 161 (1936). This Court often has held that legislative allegations of permissible purpose will not sustain actions with impermissible effects. *Wright v. City Council of Emporia*, 407 U.S. 451, 462 (1972); *Nyquist*, 413 U.S. 756, 780. We urge this Court once again to look behind statutory language and grant plenary consideration to appellants.

This Court has never addressed the factual issues as to administrative procedures presented by this case. Plenary consideration of this case on a consolidated basis with *Wolman v. Essex* would be of benefit to legislators and administrators throughout the nation.

Respectfully submitted,

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The invaluable assistance of Nori Cross and Ronald Wallace is hereby gratefully acknowledged.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-76-Civil 8

Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota, *Defendants*,

and

Lisa Garcia, Christine Garcia and Julie Anne Garcia, minors, by their father and mother and natural guardians, Ernest Garcia and Lupe Garcia, and Ernest Garcia and Lupe Garcia, individually; Robert E. Slater, III, Joseph F. Slater, Susan C. Slater, Thomas S. Slater, Timothy P. Slater, Sheila M.

Slater, and Shannon C. Slater, minors, by their father and natural guardian, Robert T. Slater, Jr., and Robert E. Slater, Jr., individually; Donna Wheaton, a minor, by her mother and natural guardian, Emma Hilliard, and Emma Hilliard, individually; and Leigh Ann Spears and Lisa Spears, minors, by their father and natural guardian, William Spears, and William Spears, individually,

Defendant Intervenors,

and

David and Julaine Wachholz, individually, and Amy, Michael and Laurel Wachholz, minor children, by their parents and natural guardians, David and Julaine Wachholz; James P. Larkin, individually, and Ann, Matthew, Thomas, Mary, Cecilia, Joan, Eileen, Gregory, John and Margaret Larkin, minor children, by their parent and natural guardian, James P. Larkin; Willis Weiberdink, individually, and Joan, Jan, and Wesley Weiberdink, minor children, by their parent and natural guardian, Willis Weiberdink; Robert E. and Rose Mary Geist, individually, and Robert E., Jr., Rose Mary, Christopher, and Larry Geist, minor children, by their parents and natural guardians, Robert E. and Rose Mary Geist,

Defendant Intervenors.

MEMORANDUM OPINION

Before HEANEY, Circuit Judge, and DEVITT and LARSON, District Judges.

PER CURIAM.

Plaintiffs Minnesota Civil Liberties Union (MCLU), Americans United for Separation of Church and State (Americans United), five organizations of public school teachers and administrators, and three individual taxpayers, who are members of one or more of the plaintiff organizations, seek a declaratory judgment that Minnesota Statutes § 123.931-937 (1975), concerning aid to private schools, is invalid as "a law respecting an establishment of religion" prohibited by the United States Constitution.[1] They also requested preliminary and permanent injunctions against enforcement of the statute.

Pursuant to 28 U.S.C. § 2882, in force at the time the complaint was filed requesting the convening of a three judge court, a panel was appointed and a hearing as to final relief was had before it on September 28, 1976.

I. *Standing of the organizational plaintiffs to sue.*

As a preliminary matter, the Court must rule on defendants' motion to dismiss the organizational plaintiffs for lack of standing. Defendants assert correctly that these plaintiffs accurately allege, at most, injury to their members, all of whom are taxpayers; none believably alleges injury to itself as an organization,[2] and the MCLU and Americans United can claim only a historical civic interest in the issue before the Court.

The Supreme Court has held that individual taxpayers have standing to raise a constitutional challenge to Federal spending programs that may violate the Establishment Clause, *Flast*

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[1] The statute is drawn to provide for aid to "nonpublic" schools. The parties do not dispute the conclusion that a large majority of the schools and students benefited by the statute are not only private but are operated by religious organizations, with the specific purpose of inculcating in their students religious values and adherence to a particular faith. *See, e.g., Lemon v. Kurtzman,* 403 U.S. 602 at 625-642 (1971) (Douglas, J., concurring).

[2] A claim is made on behalf of the professional organizations that they may lose membership and financial support if State aid to private schools makes them a more attractive choice to students; the number of public school students drops, teachers are laid off, and organization membership suffers. The Court finds this a tenuous theory of injury.

v. Cohen, 392 U.S. 83 (1968), and plainly State taxpayers may also challenge State statutes on the same grounds. *See Lemon v. Kurtzman,* 310 F. Supp. 35 (M.D. Pa. 1969), *aff'd* 403 U.S. 602 (1971); H. M. Hart & H. Wechsler, *The Federal Courts and the Federal System,* (2d ed., P. Bator, et al. 1973), 181. It also has held that where an organization can allege "injury in fact" to its members, it may sue on their behalf where it seeks to challenge their treatment under a statute, regulation or ruling. *Sierra Club v. Morton,* 405 U.S. 727 (1973) (Administrative Procedure Act); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970) (ruling by Comptroller of the Currency); *Eastern Kentucky Welfare Rights Organization v. Simon,* 44 U.S.L.W. 4724 (June 1, 1976) (IRS ruling under the Internal Revenue Code). The Court has not, however, made any clear pronouncement concerning the standing of organizational plaintiffs to sue on behalf of their members where the subject of the suit is a constitutional challenge to a statute, and its recent holdings on the issue, particularly in nonpublic school aid cases, have been inconsistent.

In *Lemon v. Kurtzman, supra,* the Court accepted without discussion the lower court's dismissal of the organizational plaintiffs. However, in *Meek v. Pittenger,* 421 U.S. 349, 365 n.5 (1975), another nonpublic school aid case, the Court confirmed the lower court's conclusion that organizational plaintiffs such as the ACLU, Americans United, and the NAACP were proper plaintiffs. In *Warth v. Seldin,* 422 U.S. 490 (1975), which involved a constitutional challenge to local land use planning practices, the Court recognized the right of organizations to assert the constitutional claims of their members but dismissed the case on grounds that the members themselves lacked the requisites of standing, so that the organizations could not derive standing from them.

The distinction between constitutional and statutory claim, as it affects standing, is a highly artificial one, and the trend of Supreme Court decisions is to blur that distinction. Given this trend and the participation here of individual taxpayer plaintiffs whose presence ensures that the case will not be dismissed, the Court finds that the organizational plaintiffs may remain in the case as representatives of their taxpayer members. *See, Public Funds for Public Schools of New Jersey v. Marburger,* 358 F. Supp. 29 (D. N.J. 1973), aff'd 417 U.S. 961 (1974); *Committee for Public Education and Religious Liberty v. Rockefeller,* 322 F. Supp. 678 (S.D. N.Y. 1971).

II. *The school aid statute.*

The pertinent parts of the statute in question here provide for the loan of textbooks and other instructional materials to students in nonpublic schools (Minn. Stat. § 123.933); loan of "equipment," such as the apparatus used in science or physical education classes, to nonpublic school children (Minn. Stat. § 123.934); and provision of "auxiliary services" (counseling, testing, speech and hearing, etc.) to nonpublic students in their own schools where possible (Minn. Stat. § 123.935). Because the latter two sections have not been implemented and the State Department of Education has no immediate plans to do so, the Court is not in a position to evaluate the constitutionality of their application. Because constitutional application may be possible, the Court cannot find them facially unconstitutional. The only section of the statute at issue here, then, is § 123.933:

> "*Purchase or loan of instructional materials*
> The state board of education shall promulgate rules under the provisions of Minnesota Statutes, Chapter 15, requiring that in each school year, based upon formal requests by or on behalf of nonpublic school students in a nonpublic school, the local districts or intermediary service areas

shall purchase or otherwise acquire instructional materials and loan or provide them for use by children enrolled in that nonpublic school. These instructional materials shall be loaned or provided free to the children for the school year for which requested. The loan or provision of the instructional materials shall be subject to rules prescribed by the state board of education. In the case of consumable or nonreusable instructional materials the title and possession may be surrendered to the nonpublic school student for whom they are provided; in the case of nonconsumable or reusable instructional materials the title to same shall remain in the servicing school district or intermediary service area, and possession or custody may be granted or charged to administrators of the nonpublic school attended by the nonpublic school pupil or pupils to whom the instructional materials were loaned. The cost per pupil unit of the instructional materials provided for in sections 123.931 to 123.937 for each school year shall not exceed the statewide average cost per pupil unit spent by the Minnesota public elementary and secondary schools for instructional materials as computed and established by the department of education by each preceding October 1 from the most recent public school year data then available. The commissioner shall allot to the school districts or intermediary service areas the total cost for each school year of providing or loaning the instructional materials for the students in each nonpublic school which shall not exceed the product of the statewide average cost per pupil unit multiplied by the number of nonpublic school pupil units enrolled as of October 1 of the preceding school year."

The statutory definition of "instructional materials" includes:

". . . textbooks, books, workbooks, published materials, reusable workbooks or manuals, whether bound or in looseleaf form, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, globes, sound recordings, . . . processed slides, transparencies, film, filmstrips, kinescopes, video tapes, . . . the term includes only such secular, neutral and nonideological instructional materials as are available and are of benefit to Minnesota public school students and are intended for use as implements or sources of study for a given class or group of students and which are expected to be available for the individual use of each pupil in such class or group; the term shall also include such secular, neutral, nonideological instructional materials as are normally provided and made available in public school libraries . . . ." Minnesota Statutes, § 123.932 subd. 1 (1975).

The evaluation of a statute in light of the Establishment Clause involves three major considerations: whether the statute has a secular legislative purpose; whether its "primary effect" is "one that neither advances nor inhibits religion;" whether it fosters " 'an excessive government entanglement with religion'." *Lemon v. Kurtzman*, 403 U.S. 603 at 612, 613 (1970). The Court finds that Minnesota Statute § 123.933, as written and as applied, satisfies these criteria.

A. *Textbooks.*

Although the statute describes textbooks as only one item in the broad category of "instructional materials," the current state of the law is such that textbook loans should be considered separately from loans of other materials. In *Board of Education of Central School District No. 1, et al v. Allen*, 392 U.S. 236 (1967), and *Meek v. Pittenger*, 421 U.S. 349 (1975),

the Supreme Court approved textbook loan programs substantially similar to the one adopted here. The Court has never, however, passed on the constitutionality of a program like the Minnesota one for distribution of other materials.[3]

As it is established under the Minnesota law, the textbook loan program requires the nonpublic schools to collect the loan requests of their students and pass them on to the school districts. The requested books must be "such secular, neutral, nonideological instructional materials as are available and of benefit to Minnesota public school students." Minn. Stat. § 123.932 subd. 1. A per-student ceiling on the requests for all instructional materials is set at the "statewide average cost per pupil unit" spent by the school districts in the previous academic year. Minn. Stat. § 123.933. This "cost per pupil unit" is determined by reference to certain categories, known as Code 220 (textbooks), 230 (libraries and audiovisual materials), and 240 (instructional supplies), in the school districts' annual report form. Stipulation No. 14, September 22, 1976.

Plaintiffs concede, and the Court agrees, that the statute in question is intended to serve an adequately secular purpose: treatment of nonpublic school students equal to that of public school students, so as to encourage freedom of choice in education and to allow for that cultural diversity which is basic to our way of life. Minn. Stat. § 123.931, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 at 773, 783 (1972).

The boundaries of "primary effect" have been established in a series of school aid cases beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947). The Court has held repeated-

[3] The scheme for distribution of other material involved in *Meek, supra*, provided for a loan directly to the *schools*. The statute in question here provides for loans directly to the *pupils*.

ly that aid to nonpublic school students, if it meets all the other tests of constitutionality, will not be invalid simply because it may provide an indirect benefit to religious schools by relieving some of their financial burden or making it easier for students to attend. *Tilton v. Richardson*, 403 U.S. 672 at 679 (1970); *Meek v. Pittenger, supra*, at 359. It also has noted that some interaction between church and state is inevitable in our society, and that the State's proper role is not to avoid all such contact but to maintain neutrality in its treatment of religious institutions. *Roemer v. Board of Public Works of Maryland, et al*, 44 U.S.L.W. 4939 at 4932-33 (June 22, 1976).

In the context of textbook distribution, the State's neutrality is preserved by providing aid directly to students instead of to schools, by making certain that the amount of aid does not exceed the per pupil amounts allocated for the same items in the public schools, and by requiring that the books so provided be of a secular nature only, incapable of diversion to religious use. *Board of Education v. Allen, supra; Meek v. Pittenger, supra.*

The scheme established by Minn. Stat. § 123.933 for loan of textbooks to private school students, if properly implemented, allows the State to provide such aid without producing a "primary effect" of aid to religious activity. The statute provides for the loan of textbooks directly to the private school student, an arrangement which received approval in *Board of Education v. Allen, supra*, and *Meek v. Pittenger, supra*. It attempts to equalize the amounts of aid to private and public school students. It also requires that the books purchased by the public school districts for loan to private school students be those which are suitable for use in the public schools, thus establishing a standard of secular content.

Plaintiffs have demonstrated to this Court that as a result of accounting methods used by the school districts, the value

of materials supplied under the statute to private school students may exceed in some instances the value of comparable materials provided for students in the public schools. The "cost per pupil unit" in the public schools is calculated by adding certain "codes" or categories on the annual financial report. The "codes" include items other than student textbooks or "instructional materials": teachers' aids and manuals, gas and oil for vehicles assigned to staff and not used in driver education, non-classroom office supplies. Instructions for Completing Annual Financial Report, Stipulation Exhibit C, September 22, 1976. Although many publishers provide teachers' manuals free, and items that are not precisely "instructional materials" may be negligible in some cases, it is possible that the statewide average "cost" calculated this way is greater than the actual amounts spent to provide public school students with materials. If this is true, then the private school students who receive aid in the amount of the public school "cost" could be receiving more actual aid than do public school students.

Plaintiffs contend that the private students' possible receipt of an "excess benefit" under the statute renders it unconstitutional. *Americans United for Separation of Church and State v. Benton*, 413 F. Supp. 955, 959 (1975). The Supreme Court has indeed held that provision of aid can be valid within the limits of the Establishment Clause only as long as the legislature limits itself to granting private school students no more than the same benefits as are received by public school students. *Board of Education v. Allen, supra*, at 243. The statutory scheme here provides on its face for equal benefits, and it is only by an accident of accounting procedure, easily remediable, that the benefits possibly could be unequal. The Court therefore orders the State to change its procedures so

as to have the "average cost per pupil unit" reflect the actual amount spent per pupil in the public schools for instructional materials only.

Plaintiffs also argue that the statute does not provide for adequate screening of textbook requests to ensure that public funds are used to provide only secular materials for private school students, resulting in a distinct possibility, if not probability, that the primary effect of the aid could be to support the religious mission of some private schools. In support of this argument, they have submitted to this Court the results of a survey made to determine the methods by which the school districts make decisions to approve the textbook requests passed on to them by the private schools on behalf of their students. Plaintiffs contend that the survey demonstrates the failure of the local districts to examine adequately the private schools' book requests for religiously oriented material, and the answers do indicate that few of the districts have any established book lists or other formal screening method. Defendants have contested the admission of the survey results into evidence, but the Court accepts them[4] and finds that plaintiffs' argument based on them is constitutionally irrelevant.

The statute provides that the only materials that may be supplied to private school students are "such secular, neutral and nonideological instructional materials as are available and are of benefit to Minnesota public school students." Minn. Stat. § 123.932 subd. 1. This definition presumes an initial determination by public officials that the materials in question

[4] Plaintiffs invoke Federal Rule of Evidence 803(24). Defendants claim that the survey is immaterial and inaccurate, having been composed with the purpose of eliciting desired responses and having been answered by persons lacking authority and/or knowledge. The Court finds the results of the survey to be material and sees no reason to resolve complex questions of survey procedures and controls at this time.

are suitable for use in public schools and are therefore "secular" in nature. It also is very similar to the definitions of "textbook" and "instructional materials," and thus also the screening process approved by the Supreme Court in *Meek v. Pittenger, supra,* at 354 n. 3, 361-62. That Court has never stated that an elaborate system of screening and prior approval is necessary in order to guarantee that an aid scheme will not have a primary effect of encouraging religious activity, and it has declared its trust in public officials to live up to their duty of maintaining church-state separation. *Board of Education v. Allen, supra,* at 245. This Court cannot and will not depart from the Supreme Court's position and accordingly finds that the textbook request scheme as established in Minn. Stat. § 123.933 is within the limits of the Establishment Clause.

B. *Instructional materials.*

Minn. Stat. § 123.933 provides for the loan of teaching materials other than textbooks under the same conditions as those that apply to the loan of textbooks. The maps, charts, recordings, films, library books, etc., may be requested by the private schools on behalf of their students and loaned to the students directly. As in the case of textbooks, title to materials which are not reusable passes immediately to the students, while title to reusable materials remains in the public school district and possession is given to the students. Standards for ensuring the secular nature and use of the materials, and the cost-per-pupil method of setting a ceiling on benefits, are the same as those that apply to the textbook loans.

In *Meek v. Pittenger, supra.* at 363, the Supreme Court found that Pennsylvania's program of a "direct loan of instructional material and equipment [to the private schools] has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools

benefitting from the Act." The Court recognized that the materials provided were of a secular nature only, that their use would not involve the State in an entangling process of policing, and that the purpose of the program was legitimately secular. It objected solely to the form of the program, the loan of materials directly to the schools. As the Minnesota statute is drawn, the loan program benefits the students rather than the schools; the schools are given use or possession of the materials only as may be necessary for the convenience of their students. The educational value and purpose of the materials in question here is not substantially different from those of textbooks, and this Court finds no constitutional objection to the loan of materials under the same conditions as those applying to the loan of textbooks. *See Wolman v. Essex,* No. C-2-75-792 (S.D. Ohio, July 21, 1976).

IT IS ORDERED:

1. That defendants' motion to dismiss the organizational plaintiffs be, and hereby is, denied.

2. That Minnesota Statutes § 123.932 and § 123.933, "Purchase or loan of instructional materials" to private schools, is hereby adjudged to be constitutional and plaintiffs' requests for declaratory judgment and an injunction are hereby denied, subject to the following condition:

That the Minnesota Department of Education revise its financial report form and instructions to conform to the requirements stated in the memorandum opinion.

GERALD W. HEANEY
United States Circuit Judge
EDWARD J. DEVITT
United States District Judge
EARL R. LARSON
United States District Judge

November 29, 1976.

LARSON, J., dissenting in part.

While I agree that this Court is bound by the holdings in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Meek v. Pittenger*, 421 U.S. 349 (1975), to find the textbook provision of Minnesota Statutes § 123.933 constitutionally valid, I believe that the remainder of that statute is one of those "ingenious plans for channelling state aid to sectarian schools," *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 at 785 (1972), that cannot possibly coexist with the First and Fourteenth Amendments. In the first place, some of the material, such as maps, slides, and library books, may be capable of ready diversion to use in the teaching of religious themes.[5] More significantly, I find the form of the "loan" program to be a mere fiction created in an attempt to avoid constitutional objections to a scheme that benefits the private schools primarily and the students only incidentally.

Many of the items included in the statutory definition of "instructional materials," Minn. Stats. § 123.932, are things that normally are used by students only at school: globes, tapes, films, recordings, periodicals. Some of them, such as audio-visual materials and large charts or maps, ordinarily are used by groups of students at one time. At oral argument, counsel for defendant Casmey asserted that, to ensure that aid went to the students and not to the schools, the Department of Education would substitute individually usable materials for those normally used only in group settings, *e.g.*, thirty maps instead of one globe; small charts instead of large wall-hung ones. I find this suggestion to be unrealistic, financially

[5] Plaintiffs suggest, for example, that books such as *Here I Stand: A Life of Martin Luther*, or the works of certain philosophers, while apparently "neutral" in that they are available for use in the public schools, may be used for very different purposes in an institution with a primarily religious mission.

impractical, and pedagogically irresponsible. Such a policy implies, in essence, that in using public funds, private educational institutions must choose between providing no audio-visual materials and providing them for use *only* by individual students; it would result in a waste of those financial resources, the need for which resulted in passage of the statute at issue here; and it would force teachers to rely on possibly less effective materials in order to comply with the statute. The only alternative to this untenable result is the equally untenable fiction that the students are the only actual recipients of the loaned materials.

In an attempt to match the constitutionally valid textbook loan provisions, the statute establishes a Byzantine scheme for distribution of property rights in reusable instructional materials purchased with public funds. Title to the materials remains in the public school district. The right to custody and possession is in the private school. Because the constitutional basis of the scheme is a loan to students, the actual right to use must lie with the students individually. This scheme is rational insofar as textbooks are concerned, because the students do receive individual copies of books to use as they may during the school year, and the private schools can most conveniently store them during the summer. However, the characterization of materials that are traditionally and most effectively usable in a group setting or with group access as being loaned *to students* is a triumph of form over substance. Films, tapes, and some library materials, while provided for the use and benefit of students, are clearly items which must be held and accounted for by the institution. Students do not individually use them and it would be absurd to claim, even as a polite fiction, that students request them. The aid is requested by the private institutions and directly provided to them. The amount of aid could vary, depending on how much of the "cost

per pupil unit" limit is necessary to cover textbook needs; conceivably such aid could constitute the bulk of a school's requests.

In *Meek v. Pittenger, supra,* at 365-66, the Supreme Court rejected a scheme providing for loan of instructional materials to private schools as "inescapably result[ing] in the direct and substantial advancement of religious activity" despite the secular nature of the materials and the properly secular purpose of the statute. The Court has noted before that a statutory statement, that the aid is for the children or parents rather than for the schools, does not guarantee that it will withstand scrutiny under the Establishment Clause; the courts must look beyond the named recipient to the actual beneficiary. *Committee for Public Education and Religious Liberty v. Nyquist, supra,* at 781. I find that the foremost beneficiary of this aid program is the private school, which under this statute may be fully equipped by the State. The scheme thus has the primary effect of aiding schools that have been established in order to fulfill a religious mission, *Meek v. Pittenger, supra,* at 366, and accordingly is constitutionally invalid.

(Caption)

JUDGMENT

This action came on for hearing before the Court, Honorable Gerald W. Heaney, Circuit Judge, Edward J. Devitt and Earl R. Larson, United States District Judges, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Defendants' motion to dismiss the organizational Plaintiffs be, and hereby is, denied.

It is Further Ordered and Adjudged That Minnesota Stat-

utes Section 123.932 and Section 123.933, "Purchase or loan of instructional materials" to private schools, is hereby adjudged to be constitutional and Plaintiffs' requests for declaratory judgment and an injunction are hereby denied, subject to the following condition: That the Minnesota Department of Education revise its financial report form and instructions to conform to the requirements stated in the memorandum opinion.

Filed Nov. 30, 1976.

HARRY A. SIEBEN, Clerk
By BERNADINE L. BROWN
Deputy

Dated at St. Paul, Minnesota, this 30th day of November, 1976.

HARRY A. SIEBEN
Clerk of Court
By BERNADINE L. BROWN
Deputy Clerk

(Caption)

NOTICE OF APPEAL TO
UNITED STATES SUPREME COURT

TO: Michael J. Bradley, Spec. Asst. Attorney General
Mark B. Levinger, Spec. Asst. Attorney General
303 Capitol Square Bldg.
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Briggs & Morgan
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St. Paul, Minnesota 55101
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430 Minnesota Building
St. Paul, Minnesota 55101

PLEASE TAKE NOTICE that all plaintiffs above named hereby appeal to the Supreme Court of the United States from that part of the Order of this Court in this action, dated November 29, 1976, adjudging Sections 123.932 and 123.933 of Minnesota Statutes to be constitutional, save and except such part of said Memorandum Order directing certain defendants to take remedial action.

Said appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated this 13th day of January, 1977.

WILLIAM I. KAMPF
Attorney for Plaintiffs
310 Empire Building
Saint Paul, Minnesota 55101
612—227-8209

AFFIDAVIT OF SERVICE BY MAIL

State of Minnesota
County of Ramsey—ss.

William I. Kampf, being first duly sworn, deposes and says that on January 13, 1977, he served the attached Notice of Appeal upon Timothy Quinn, Esq., John Kenefick, Esq., and Michael Bradley, Spec. Assistant Attorney General, attorneys for defendants by placing a true and correct copy thereof in envelopes addressed as follows:

Mr. Timothy Quinn
Attorney at Law
Minnesota Building
St. Paul, Minnesota

Mr. John Kenefick
Attorney at Law
Briggs & Morgan
First National Bank Bldg.
St. Paul, Minnesota 55101

Mr. Michael Bradley
Spec. Assistant Attorney General
303 Capitol Square Building
St. Paul, Minnesota 55101

(which is the last known addresses of said attorneys) and depositing the same, with postage prepaid, in the United States mails at St. Paul, Minnesota.

WILLIAM I. KAMPF

Subscribed and sworn to before me this 13 day of January, 1977. — Marilyn Oines, Notary Public, Dakota County, Minnesota. My commission expires July 2, 1980.

STATUTES INVOLVED

CHAPTER 396

An Act relating to education; children attending nonpublic schools; providing auxiliary services, textbooks, instructional materials and equipment; appropriating money.

Be it enacted by the Legislature of the State of Minnesota:

Section 1.

123.931 Declaration of policy

It is the intent of the legislature by Laws 1975, Chapter 396 to provide for distribution of educational aids such as auxiliary services, instructional materials and equipment so that every school child in the state will share equitably in education benefits and therefore further assure all Minnesota students and their parents freedom of choice in education.

Sec. 2.

123.932. Definitions

Subdivision 1. "Instructional materials" means textbooks, books, workbooks, published materials, reusable workbooks or manuals, whether bound or in looseleaf form, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, film, filmstrips, kinescopes, video tapes, or any other printed and published materials of a similar nature made by any method: the term includes only such secular, neutral and nonideological instructional materials as are available and are of benefit to Minnesota public school students and are intended for use as implements or sources of study for a given class or group of students and which are expected to be available for the individual use of each pupil in such class or group; the term shall also include such secular, neutral, nonideological instructional materials as are normally provided and made available in public school libraries. The term shall be limited to "textbooks", "school library and audio visual materials" and "instructional supplies" as those terms or their equivalent are described and designated in the manual of instructions for uniform accounting for Minnesota school districts, published by the department of education.

Subd. 2. "Pupil units" shall be defined as in Minnesota Statutes, Section 124.17, Subdivision 1, Clauses 1 and 2.

Subd. 3. "Nonpublic school" means any school within the state other than a public school, wherein a resident of Minnesota may legally fulfill the compulsory school attendance requirements of Minnesota Statutes, Section 120.10, and which

meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).[1]

Subd. 4. "School" means any public or nonpublic school within the state wherein children receive educational services and materials provided for or recognized by the state, limited to kindergarten through grade 12.

Subd. 5. "Pupil" or "student" means a child enrolled in a school and is limited to children who are residents, or children of residents, of Minnesota.

Subd. 6. "Auxiliary services" means guidance, counseling and testing services; psychological services; services for handicapped children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged; and such other secular, neutral, nonideological services as are of benefit to nonpublic school children and which are provided for public school children of Minnesota.

Subd. 7. "Intermediary service area" means a school administrative unit approved by the state board of education, other than a single school district, such as but not limited to the following: (a) a regional educational service area; (b) a cooperative of two or more school districts; (c) learning centers; or (d) an association of schools or school districts.

Subd. 8. "Equipment" means any item that is a moveable unit of furnishing, an instrument, a machine, an apparatus, or set of articles which meet all the following conditions: (1) It retains its original shape and appearance with use; and (2) It is nonexpendable, that is, if the article is damaged or some of its parts are lost or worn out, it is usually more feasible

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[1] 42 U.S.C.A. § 2000d et seq.

to repair rather than replace it with an entirely new unit. The term shall be limited to secular, neutral, nonideological items and devices which are used by children in public schools and shall be limited to courses or curriculum relating to: physical education programs, laboratory sciences, mathematical sciences, business training, practical arts and vocational-technical programs. The term shall exclude any items and devices which are capable of being used for the instruction of religion or religious tenets.

Sec. 3.

123.933 Purchase or loan of instructional materials

The state board of education shall promulgate rules under the provisions of Minnesota Statutes, Chapter 15, requiring that in each school year, based upon formal requests by or on behalf of nonpublic school students in a nonpublic school, the local districts or intermediary service areas shall purchase or otherwise acquire instructional materials and loan or provide them for use by children enrolled in that nonpublic school. These instructional materials shall be loaned or provided free to the children for the school year for which requested. The loan or provision of the instructional materials shall be subject to rules prescribed by the state board of education. In the case of consumable or nonreusable instructional materials the title and possession may be surrendered to the nonpublic school student for whom they are provided; in the case of nonconsumable or reusable instructional materials the title to same shall remain in the servicing school district or intermediary service area, and possession or custody may be granted or charged to administrators of the nonpublic school attended by the nonpublic school pupil or pupils to whom the instructional materials were loaned. The cost per pupil unit of the

instructional materials provided for in Laws 1975, Chapter 396 for each school year shall not exceed the statewide average cost per pupil unit spent by the Minnesota public elementary and secondary schools for instructional materials as computed and established by the department of education by each preceding October 1 from the most recent public school year data then available. The commissioner shall allot to the school districts or intermediary service areas the total cost for each school year of providing or loaning the instructional materials for the students in each nonpublic school which shall not exceed the product of the statewide average cost per pupil unit multiplied by the number of nonpublic school pupil units enrolled as of October 1 of the proceding school year.

Sec. 4.

123.934 Purchase and provision or loan of equipment

The state board of education shall promulgate rules under the provisions of Minnesota Statutes, Chapter 15, requiring that in each school year, based upon formal requests by or on behalf of nonpublic school students in a nonpublic school, the local districts or intermediary service areas shall purchase or otherwise acquire equipment and loan or provide the same for use by children enrolled in that nonpublic school. This equipment shall be loaned or provided free for the children for the school year for which requested. The loan or provision of the equipment shall be subject to rules prescribed by the state board of education and prior to September 1, 1975, and January 1 of each year thereafter, the state board shall promulgate rules and regulations specifically designating which items and devices are capable of being used for the instruction of religion or religious tenets. Title to the equipment shall remain in the servicing school district or intermediary service

area, but possession or custody may be granted or charged to administrators of the nonpublic school attended by the nonpublic school pupil or pupils for whom the equipment is provided and loaned. The commissioner shall allot to the school districts or intermediary service areas the total cost for each school year of providing or loaning the equipment for the students in each nonpublic school, which shall not exceed $10 per pupil unit enrolled as of October 1 of the preceding school year.

Sec. 5.

123.935 Provision of auxiliary services

The state board of education shall promulgate rules under the provisions of Minnesota Statutes, Chapter 15 requiring each school district or other intermediary service area to provide each year upon formal request by a specific date by or on behalf of a nonpublic school student enrolled in a nonpublic school, the same auxiliary services as are provided for Minnesota public school pupils. The requests shall be limited collectively to nonpublic school students enrolled in a given nonpublic school. The auxiliary services shall be provided in the student's respective school whenever possible by the district or intermediary service area wherein the nonpublic student's school is situated. The cost of the required services shall not exceed the amount allotted under this section to the participating district or intermediary service area. Each school year the commissioner shall allot to the school districts or other intermediary service areas for the provision of the services the actual cost of the services for that school year not to exceed $50 multiplied by the number of nonpublic school pupils in grades 9 through 12 and $75 multiplied by the number of nonpublic

school pupils in kindergarten through grade 8, enrolled as of October 1 of the last preceding school year.

Sec. 6.

123.936

In every event the commissioner shall make such payments to school districts or intermediary service areas pursuant to this act as are needed to meet contractual obligations incurred for the provision of benefits to nonpublic school students pursuant to section 123.933, 123.934 or 123.935.

Sec. 7. The provisions of this act shall be severable, and if any provision thereof, or the application of any such provision under any circumstances is held invalid, it shall not affect any other provision of this act or the application of any provision thereof under different circumstances.

Sec. 8.

123.937 Continuing appropriation

There is appropriated annually to the department of education from the general fund of the state treasury the sum of $12,000,000 for the purposes of Laws 1975, chapter 396.

Sec. 9. This act is effective July 1, 1975.

Approved June 4, 1975.

CHAPTER THIRTY-SEVEN: EDU 740-759 INSTRUCTIONAL MATERIALS FOR PUPILS ATTENDING NONPUBLIC SCHOOLS (ALL NEW MATERIAL)

Edu 740 Policy

In order to promote equal educational opportunity for every school child in Minnesota and to assure all Minnesota pupils and their parents freedom of choice in education, the benefits provided by Minn. Laws 1975, Chapter 396 shall be made

available to pupils in nonpublic schools as provided in this chapter.

Edu 741 Textbooks

(a) General Administration

(1) The department of education shall administer funds allocated for the purchase of textbooks to be loaned to nonpublic school pupils.

(2) The department of education's administrative costs shall not exceed two percent of the state allocation for textbook loans.

(3) The department of education, in cooperation with the state auditor's office, shall establish proper accounting methods for fiscal control, fund accounting, and the maintenance of records for the acquisition of textbooks to be loaned.

(b) Local Administration

(1) Each nonpublic school pupil shall make an application through the nonpublic school for the 1975-76 year within 30 days of the effective date of this regulation and on or before March 1 for the following years for textbooks to be loaned by the public school district in which the nonpublic school office is located. The public school district shall transmit the application to the department of education. The applications shall be on a form prescribed by the commissioner. Application forms shall be available in the office of the public school superintendent on the effective date of these regulations.

(2) The department of education shall allocate aid for textbook purchases to the districts in which the nonpublic school office is located. The local school district shall make the purchases and transmit the textbooks.

(3) Textbooks loaned to pupils in nonpublic schools shall be maintained on inventory by the local school district.

(4) The local school district in its discretion may declare loaned school books unusable and permit the disposal of such textbooks.

(5) The nonpublic school shall maintain on file all applications for textbooks loaned to pupils in attendance in the nonpublic school. The applications shall be available to the department of education.

(6) Upon completion of the distribution of the textbooks each local school district may claim from the department of education for the administration of the textbook loan program a sum not to exceed five percent of the cost of the textbooks loaned.

(c) Availability of Funds

The average cost for textbooks shall be the total expenditure for textbooks reported by all public school districts in the state divided by the total number of pupil units based on an unduplicated count of pupils enrolled in the districts during the same fiscal year. For the 1975-76 school year, the amount of the allocation shall not exceed $7.48 per nonpublic pupil unit as determined for the 1973-74 school year.

Edu 742 Other Instructional Materials

(a) General Administration

(1) The department of education shall administer funds allocated for the loan of other instructional materials, as defined in Minn. Laws 1975, Chapter 396, Section 2.

(2) The department of education's administrative costs shall not exceed two percent of the state allocation for other instructional materials.

(3) The department of education, in cooperation with the state auditor's office, shall establish proper accounting methods for fiscal control, fund accounting, and the main-

tenance of records for the acquisition of other instructional materials to be loaned.

(b) Local Administration

(1) Other instructional materials shall be loaned according to procedures set forth in Minn. Reg. Edu 741(b).

(2) Upon completion of the distribution of the other instructional materials, each local school district may claim from the department of education, for the administration of the other instructional materials loan program, a sum not to exceed five percent of the cost of the other instructional materials loaned.

(c) Availability of Funds

For the 1975-76 school year, the amount of the allocation shall not exceed $37.95 per nonpublic pupil unit. The allocation shall be adjusted annually according to the most recent public school year data.

Edu 743-759 Reserved for future use.

(Caption)

STIPULATION

TO: JUDGES OF THE ABOVE NAMED COURT:

The parties to the above-referenced case, through counsel, hereby stipulate that the facts hereinafter set forth are true; that all documents appended hereto are true and correct copies of their originals; and that the following statement of facts, together with all documents identified herein and appended hereto, may be relied upon by the Court in the determination of the legal issues raised by the pleadings. This Stipulation is made by the parties to this proceeding upon and subject to the conditions that:

(a) all facts recited herein are stipulated by and between the parties for the purposes of this proceeding only and nothing contained herein shall constitute an admission by any party for any other purpose, action or proceeding;

(b) This stipulation to the truth and accuracy of the facts included herein and the documents appended hereto, does not constitute an admission by either party with respect to the relevancy or materiality of any such fact or document.

1. Each individual Plaintiff is a citizen of the United States and resides in and pays various taxes to the State of Minnesota. All other Plaintiffs are organizations having members who reside in and pay taxes to the State of Minnesota.

2. Each and every state Defendant is made a party Defendant solely in their respective official capacities, to-wit:

Howard Casmey is the commissioner of Education of the State of Minnesota;

James Lord is the Treasurer of the State of Minnesota;

Dorothea M. Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling and Henry G. Tweten compose the Minnesota State Board of Education.

3. The two groups of Intervenor Defendants are composed of forty-four individuals. Thirty-three of the Forty-four individuals are minor children who are recipients of aid under the Act. Eleven of the Forty-four individuals are parents of recipients of aid under the Act and reside in and pay taxes to the State of Minnesota.

4. Minn. Laws 1975, Ch. 396 (M.S. §§123.931 to 123.937) was duly enacted June 4, 1975, and became effective July 1, 1975.

5. Pursuant to the aforesaid Act, the Board of Education of the State of Minnesota duly adopted rules referred to as Chapter 37, Edu 740-759, a copy of which is attached hereto as Exhibit A. These rules became effective on November 18, 1975.

6. Before aid may be received by an individual pupil, the pupil must request participation in the nonpublic school aid program. The request is submitted to the pupil's nonpublic school which in turn requests that materials be supplied to the pupil by the local public school district. Once the local public school district has supplied the materials to the pupil, the public school district is entitled to reimbursements for its costs and expenses from the State Department of Education. There have been no instances in which an individual pupil has applied for aid where the nonpublic school he is attending has chosen not to participate.

7. During the 1975-76 school year there were numerous nonpublic schools in which a certain portion of the pupils elected to participate in aid pursuant to the Act while other eligible pupils in the same school declined to so participate.

8. Some nonpublic pupils receiving aid pursuant to the Act attend nonpublic schools operated by churches or religious organizations. Some of these nonpublic schools:

a) Have as one of their primary purposes the teaching, propogation and promotion of a particular religious faith;

b) Conduct the sectarian portion of their operations, curricula and programs to fulfill that purpose;

c) Require attendance at courses in religious doctrine or at religious worship services for those pupils of the same faith as that of the sponsoring church or organization;

d) Are an integral part of the religious missions of the sponsoring church or religious organization;

e) Contain religious symbols;

f) Direct their teachers to limit certain subjects to be within the tenets of the particular religion.

9. Materials, supplies, equipment and services for which nonpublic pupils are eligible under the Act are provided to pupils in public schools at public expense.

10. The Minnesota Educational Directory, 1975-1976, published by the Department of Education, State of Minnesota, accurately sets forth the enrollment figures for both public and nonpublic elementary and secondary schools in Minnesota for the school year 1974-75.

11. Exhibit B accurately presents the following information for each local public school district in Minnesota, for the school year 1974-75:

a) Total cost of textbooks;

b) Total combined cost for textbooks, school library and audio-visual materials, and instructional supplies;

c) Total cost per pupil unit for the textbooks, school library and audio-visual materials, and instructional supplies.

A further exhibit will be supplied for school year 1975-76 when available from the State Department of Education.

12. The attorney for Plaintiffs has distributed a questionnaire soliciting the responses of the superintendents of all the school districts in Minnesota. Plaintiffs' attorney has received answers from some of the school districts. Plaintiffs' attorney intends to submit in an affidavit a collation of the answers that were received. Defendants, however, do not agree that the answers received are either accurate, relevant, or admissible in evidence without further foundation.

13. Exhibit C is the annual financial report form and instructions for the school year ending June 30, 1976, required to be filed by August 1, 1976, by each public school district in the State of Minnesota.

14. The statewide average expenditure under M.S. §123.933 is calculated by adding Code 220, 230 and 240 of Exhibit C and dividing the sum by the statewide unduplicated pupil units.

15. Supplementary textbooks which are used in the public schools as reference materials are included in Code 220; some of these reference materials are funded by federal sources.

16. In the Minneapolis School District and possibly other school districts Code 220 includes expenditures for textbooks and reference materials for teachers as well as students.

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AFFIDAVIT

State of Minnesota
County of Ramsey—ss.

William I. Kampf being first duly sworn deposes and says as follows:

In May of 1976, an auxiliary aids questionnaire (copy attached) was mailed to the 176 school district superintendents

in Minnesota. The object of the questionnaire was to survey the practices and procedures utilized to implement Minn. Stat. 123.931 et seq. (Supp. 1975). From a total of 176 requests, 116 responses were received, yielding a sampling ratio of better than 65 percent.

The questionnaire sought information concerning: expenditures under the act; the administrative burden imposed by the act; the character of textbooks supplied under the act; the details of the textbook selection and approval processes; meetings between public and non-public school officials; any rejected aid requests; any resulting aid reductions to public schools; and any increase in non-public school tuition or fees. Only those responses dealing with the selection and approval of textbooks will be tabulated here.

Question 4: Have any requests for textbooks or instructional materials on behalf of non-public school students been for books or materials not currently in use in your district?

RESPONSE

Yes 61 (52%)
No 30 (26%)
Other 25 (22%)

Question 5: Are books requested by non-public schools read to determine their religious content? (i.e. whether those books are secular, neutral and non-ideological?)

RESPONSE

Yes 14 (12%)
No 92 (79%)
Other 10 (9%)

Limiting the tabulation to those 61 districts answering yes to Question 4, the responses appear:

Yes 7 (7/61 - 11.5%)
No 54 (54/61 - 88.5%)
Other 0 (0%)

Question 7: Does your district have written standards to determine whether a book is: secular?, neutral?, non-ideological?

RESPONSE

Yes 2 (2%)
No 96 (83%)
Other 18 (15%)

No response actually contained any written standards specifically pertaining to the described parameters.

Question 8: If there are no written standards regarding Question 7, please describe what standards are used to determine if a book is:

A. secular
B. neutral
C. non-ideological

RESPONSE The diversity of answers precludes a concise tabulation. Only one district actually defined the applicable standards, a few districts referred to the State Department of Education regulations or the American Library Association policy, and the bulk of the responses indicate they had no such standards. It is of consequence to note that at least nine districts indicated that determinations pertaining to textbook content were the responsibility of the non-public school ordering the books.

Question 13 A: In your district, have any requests by non-public schools for instructional materials, textbooks or supplies been rejected because of potential use for religious purposes or instruction?

RESPONSE

Yes 7 (6%)

No 107 (92%)

Other 2 (2%)

Question 13 B: Please describe any rejected requests?

RESPONSE The rejected requests included orders to secular publishing houses.

Further Affiant saieth not.

WILLIAM I. KAMPF

Subscribed and sworn to before me this 21st day of September, 1976. — Marilyn Oines, Notary Public, Dakota County, Minnesota. My commission expires July 2, 1980.

In The

Supreme Court of the United States

October Term, 1976

No. 76-1144

MINNESOTA CIVIL LIBERTIES UNION, et al.,
Plaintiffs-Appellants,

vs.

HOWARD CASMEY, Commissioner of Education of the State of Minnesota, et al.,
Defendant-Respondents,

and

LISA GARCIA, et al.,
Defendant Intervenors-Respondents,

and

DAVID and JULAINE WACHHOLZ, et al.,
Defendant Intervenors-Respondents.

On Appeal from the United States District Court for the District of Minnesota

JOINT MOTION TO DISMISS OR AFFIRM

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COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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JOINT MOTION TO DISMISS OR AFFIRM

—o—

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1976

—o—

No. 76-1144

—o—

Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School

Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the

State of Minnesota,

Plaintiffs-Appellants,

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota,

Defendants-Respondents,

and

Lisa Garcia, Christine Garcia and Julie Anne Garcia, minors, by their father and mother and natural guardians, Ernest Garcia and Lupe Garcia, and Ernest Garcia and Lupe Garcia, individually; Robert E. Slater, III, Joseph F. Slater, Susan C. Slater, Thomas S. Slater, Timothy P. Slater, Sheila M. Slater, and Shannon C. Slater, minors, by their father and natural guardian, Robert T. Slater, Jr., and Robert E. Slater, Jr., individually; Donna Wheaton, a minor, by her mother and natural guardian, Emma Hilliard, and Emma Hilliard, individually; and Leigh Ann Spears and Lisa Spears, minors, by their father and natural guardian, William Spears, and

William Spears, individually,

Defendant Intervenors-Respondents,

and

David and Julaine Wachholz, individually, and Amy, Michael and Laurel Wachholz, minor children, by their parents and natural guardians, David and Julaine Wachholz; James P. Larkin, individually, and Ann, Matthew, Thomas, Mary, Cecilia, Joan, Eileen, Gregory, John and Margaret Larkin, minor children, by their parent and natural guardian, James P. Larkin; Willis Weiberdink,

individually, and Joan, Jan and Wesley Weiberdink, minor children, by their parent and natural guardian, Willis Weiberdink; Robert E. and Rose Mary Geist, individually, and Robert E., Jr., Rose Mary, Christopher and Larry Geist, minor children, by their parents and natural guardians, Robert E. and Rose Mary Geist,

Defendant Intervenors-Respondents.

JOINT MOTION TO DISMISS OR AFFIRM

Defendant Intervenors-Respondents Lisa Garcia, et al., and Defendant Intervenors-Respondents David and Julaine Wachholz, et al., jointly move the Court to dismiss the appeal, or to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of this cause depends are so insubstantial as not to need further argument.

This Motion is based upon Rule 16 (1) (c) of the Supreme Court Rules and upon the within Brief.

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JURISDICTION

This action was commenced in the United States District Court for the District of Minnesota pursuant to 28 United States Code § 1343(3) and 42 United States Code § 1983, the plaintiffs alleging that Chapter 396 of the Laws of Minnesota, 1975 (now codified as Minnesota Statutes § 123.931 through § 123.937), violated the First and Fourteenth Amendments to the United States Constitution by causing an establishment of religion (Complaint, Supplemental Appendix 1). A three-judge court was properly convened pursuant to 28 United States Code § 2284, and a decision rendered. The plaintiffs below filed a timely Notice of Appeal to this Court pursuant to 28 United States Code § 1253.

———o———

OPINION BELOW

The opinion of the three-judge court is not reported but is set forth in the Appendix to the Jurisdictional Statement at A. 1-16.

———o———

STATEMENT OF THE CASE

In 1975 the Minnesota Legislature enacted Chapter 396 of the Minnesota Laws entitled "Educational Aids for Nonpublic School Children." The stated secular legislative purpose of this chapter was to "provide for distribution of educational aids such as auxiliary services, instructional materials and equipment so that every school

child in the state will share equitably in education benefits and therefore assure all Minnesota students and their parents freedom of choice in education." Minnesota Statutes § 123.931. There are three operative portions of the Act, namely, the purchase or loan of instructional materials (Minnesota Statutes § 123.933), the purchase and provision or loan of equipment (Minnesota Statutes § 123.934), and the provision of auxiliary services (Minnesota Statutes § 123.935). These statutes are not self-executing but instead require the Minnesota State Board of Education to adopt administrative rules and regulations. Rules have been adopted only with reference to the first statute, namely, that dealing with instructional materials. These rules are known as Minnesota Regulations, Department of Education § 740 through § 742. No rules have been adopted with respect to the other two portions of the Act.

The plaintiffs consist of individuals and groups opposed to any form of assistance to nonpublic school students or nonpublic schools. The defendants consist of the Commissioner of Education of the State of Minnesota and various state public officials who have the responsibility to administer this Act.

Two groups of parents and children were granted permission to intervene. The Lisa Garcia group of intervenors consists of taxpaying parents and their children, all of whom are enrolled in Roman Catholic schools in Minnesota, and all of whom have applied for instructional materials assistance under the Act. The Wachholz group of intervenors also consists of taxpaying parents and their children. These children attend either schools affiliated

with some religious entity other than Roman Catholic or schools that are nonpublic, but have no religious affiliation whatsoever. Similar to the other group, they have applied for instructional materials assistance under the Act.

The three-judge court fully considered the constitutional challenges to the Act, and upheld the constitutionality of the instructional materials statute, Minnesota Statutes § 123.933. Because the other two operative sections of the Act had not been implemented by regulation, the Court did not evaluate them from a constitutional viewpoint. The Court did volunteer, however, that "Because constitutional application may be possible, the Court cannot find them facially unconstitutional." (A. 5).

Because of the similarity of their interests and their desire to expedite this proceeding before the Court, the Garcia intervenors and the Wachholz intervenors have decided to submit a joint motion and brief.

———o———

QUESTION PRESENTED

The moving parties submit there is only one issue before the Court:

Is a substantial federal question presented by a decision upholding state assistance to nonpublic school students in the form of instructional materials, where the Court below held the statute was not materially different from statutes previously upheld by this Court?

———o———

ARGUMENT

No Substantial Federal Question Is Here Presented.

A. The decision below is limited to instructional materials.

Plaintiffs-Appellants have attempted to characterize this case in broad, sweeping terms and have accorded it a degree of application wider than can be remotely possible. They have interjected the auxiliary services and equipment portions of the statute and have even listed their challenge to those portions of the Act as being the third of the "Questions Presented." (Brief, 4).

The plain fact is that the Court below did not pass upon the validity of those two portions of the Act. The Court clearly said, "The only section of the statute at issue here, then, is § 123.933" dealing with instructional materials (A. 5). The comments of Plaintiffs-Appellants on the other two sections of the Act, which have not been implemented, should simply be disregarded.

B. The purchase or loan of instructional materials for nonpublic school students is clearly in accord with prior case law.

1. The statute.

The Minnesota Statute upheld by the lower court here, Minnesota Statutes § 123.933, is set forth in the Court's opinion (A. 5) and at A. 22. Paraphrased, it allows the state Board of Education to promulgate rules whereby instructional materials can be loaned or provided by public school districts free to students enrolled in nonpublic schools. In the case of consumable materials, title and

possession may be surrendered to the student; in the case of reusable materials, title remains in the public school district. Controls are present in the statute to equalize the benefits between the public and nonpublic school systems: the cost for the instructional materials cannot exceed the statewide average cost for the same materials in the public system. The state then allots the amount of money required directly to the public school district for the purchase or loan of instructional materials by nonpublic school students in that district.

Minnesota Statutes § 123.932 then defines "instructional materials" to include textbooks, books, workbooks, manuals, periodicals, photographs, pictorial or graphic works, transparencies, filmstrips, etc., which are intended for use as implements or sources of study for a given class and which are expected to be available for the individual use of each pupil in such class. The term "includes only such secular, neutral and nonideological instructional materials as are available and are of benefit to Minnesota public school students. . . ."

2. The rationale of the three-judge court.

a. *The standard.*

The three-judge court applied the oft-repeated standard in First Amendment Establishment Clause cases: Whether the statute has a secular legislative purpose; whether its primary effect is one that neither advances nor inhibits religion; and whether it fosters an excessive government entanglement with religion. *Lemon v. Kurtzman,* 403 U. S. 603 (1971). We do not read appellants' brief in any way as challenging the

standards; they simply disagree with the conclusion reached by the trial court that the statute does not have the primary effect of advancing religion.

That conclusion is eminently correct, however, because it is fully in accord with established case law.

b. *Textbooks.*

Even though not defined separately in the statute, the trial court considered textbooks distinct from other types of instructional materials. They held the Minnesota statute as to textbooks was "substantially similar" to those statutes approved by the Supreme Court in *Board of Education of Central School District No. 1, et al. v. Allen,* 392 U. S. 236 (1968), and *Meek v. Pittenger,* 421 U. S. 349 (1975). In each case this Court upheld state acts providing for the direct loan of secular textbooks to children in nonpublic schools, which texts were acceptable for use in the public school system. Premised largely on *Everson v. Board of Education,* 330 U. S. 1 (1947), this Court in each case compared the loan of textbooks to other secular and nonideological services unrelated to any religious function of the nonpublic school, and concluded there was no Establishment Clause violation.

The *Allen* case is directly on point. There, local school boards were required to purchase textbooks and loan them free "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." The texts are those "designated for use in any public, elementary or secondary schools of the state or are approved

by any boards of education" and which "a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends." New York Education Law, § 701, quoted at 392 U. S. 239.

Appellants attempt to read *Allen* as requiring an elaborate screening process on the part of the state to ensure secular content in the texts (Brief, 11). That fact is simply not present in *Allen.* What was required was that the texts either (1) be designated for use in a public school, *or* (2) be approved by any boards of education, trustees or school authorities. That same assurance of secular content is guaranteed under the Minnesota Act in three ways: (1) the statute itself requires that the texts be "secular, neutral and nonideological" and thus suitable for use in the public schools; (2) except in a few isolated cases involving administrative expediency, the public school authorities order the textbooks and hence know of their secular content; (3) the state Department of Education has policed the operation of the Act and has encountered no material under the program which was *not* secular, neutral and nonideological. (See Affidavit of Rosemary Sommerville, Supplemental Appendix 22-24.)

In addition, there is an assumption, discussed in *Allen* and not rebutted here, that public school administrators are honestly discharging their duties.

> Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law.
>
> 392 U. S. at 245.

No elaborate prior screening process was present in *Cochran v. Board of Education,* 281 U. S. 370 (1930), and yet this Court upheld Louisiana's Act providing for the loan of secular textbooks to nonpublic school students in light of a Fourteenth Amendment challenge.

In short, the Minnesota Act is substantially similar to the statute approved in *Allen.* The Act *does* ensure secularity of content and no evidence was presented to the trial court upon which to base an argument that sectarian textbooks have crept into the operation of the statute.

Little need be said about the textbook provisions of *Meek v. Pittenger, supra.* Although there were some differences in the mechanics of the Pennsylvania Act in question, including antecedent approval of the texts by public school officials, this Court held the two programs to be "constitutionally indistinguishable." 421 U. S. at 359. The basis of the Court's reasoning can be seen in the following quotation:

> Like the New York program, the textbook provisions of Act 195 extend to all schoolchildren the benefits of Pennsylvania's well-established policy of lending textbooks free of charge to elementary and secondary school students. As in Allen, Act 195 provides that the textbooks are to be lent directly to the student, not to the nonpublic school itself, although, again as in Allen, the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials. . . . Thus, the financial benefit of Pennsylvania's textbook program, like New York's, is to parents and children, not to the nonpublic schools.
>
> 421 U. S. at 360, 361.

In short, the textbook provisions of the Minnesota Act are not materially different from those approved in either of these prior decisions, and hence no substantial federal question is presented.[1]

> Appellants have asserted highly artificial objections to the textbook program under the entanglement aspect of the test (Brief, 15-17). Although "entanglement" was not articulated as an element of the test at the time of *Allen,* it was at the time of *Meek,* and presented no difficulties for that decision. Here there is no interference by the state in religious affairs. The texts are selected by the students and their teachers and the state determines whether or not the requested texts are available for use by public school students. The state then approves or disapproves the texts. There is no analysis by the state of teaching methods, religiosity or beliefs. The state is simply approving a textbook on the basis that the same text is available for use in the public system. There is no necessity for state surveillance and no further interface between church and state. No entanglement is present.

c. *Other instructional materials.*

The intent of the Minnesota legislature in enacting this Act was to *equalize* educational benefits and opportu-

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1 The textbook provisions voided in **Public Funds for Public Schools of New Jersey v. Marburger,** 358 F. Supp. 29, aff'd, 417 U.S. 961 (1974), were entirely different from those under the Minnesota Act in that the reimbursement was not extended to parents of all children, only nonpublic school parents. In Minnesota, **all** children receive free textbooks, under either the Act in question for nonpublic school students or under Minnesota Statutes § 123.35, Subd. 10, for public school students.

nities as between the public system and the nonpublic system. Minnesota Statutes § 123.931. This intent is a fulfillment of its obligation to ensure that *all* Minnesota school children receive a quality education. Minnesota Statutes § 120.10.

In Minnesota, public school districts are prohibited from charging fees for similar nontextbook instructional materials. Minnesota Statutes § 120.74, Subd. 1. Thus in the public sector *both* textbooks and instructional materials are available to students free of charge for their individual use. The statute under consideration merely extends similar benefits to the nonpublic sector.

The trial court analyzed the other instructional materials as being different in kind than textbooks, but not different in statutory treatment. Thus they are requested by nonpublic school students, they are loaned directly to the students, and title considerations are the same. In addition to these mechanical considerations, the "standards for ensuring the secular nature and use of the materials, and the cost-per-pupil method of setting a ceiling on benefits, are the same as those that apply to the textbook loans." (A. 12). Thus the rationale of *Allen* and the textbook section of *Meek* are fully applicable.

What has occurred in recent years is simply a realization among school authorities that good teaching requires not only a textbook but other items of individual use, such as workbooks, periodicals, graphic works and filmstrips. These are readily available and used constantly in the public school system. That is why, in attempting to equalize benefits, the loan provisions were not limited to standard textbooks, but include "instructional materials." The law

is simply keeping in tune with current effective teaching methods.

The Minnesota Act is clearly different from the instructional materials section of the Pennsylvania law that was voided in *Meek v. Pittenger, supra.* Here the loan of materials is directly to the students and is limited to those materials suitable for individual use. The reverse was the case in *Meek,* which caused the Court to conclude that there was a direct flow of financial assistance from the state to the nonpublic *schools* involved. The Court was quite explicit in this distinction:

> Although textbooks are lent only to students, Act 195 authorized the loan of instructional material and equipment *directly to qualifying nonpublic elementary and secondary schools* in the Commonwealth. The appellants assert that such *direct aid* to Pennsylvania's nonpublic schools, including church-related institutions, constitutes an impermissible establishment of religion.
>
> • • •
>
> But we agree with the appellants that the *direct loan* of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act.
>
> 421 U. S. at 362, 363.
>
> (Emphasis supplied.)

Not only were the schools the direct recipients of aid in *Meek,* but the aid was quite substantial, which seemed to cause concern for the Court. See 421 U. S. at 366. The Minnesota Act, on the other hand, has definite cost limitations which limit assistance for both textbook and other instructional materials to about $45 per student in fiscal year 1976 or a total of about $4 million. (Affidavit of Rosemary Sommerville, Supplemental Appendix 20.)

Appellants raise the old argument that indirect assistance to students has the effect of aiding the institution because it relieves the institution of a possible economic burden (Brief, 14). Hence they convert the *primary* effect test into an *incidental* effect test. We thought this argument was put to rest in *Roemer v. Board of Public Works of Maryland,* — U. S. —, 96 S. Ct. 2337 (1976). Certainly *Norwood v. Harrison,* 413 U. S. 455 (1973), is no authority for appellants' assertion. The Court there recognized the application of the very arguments respondents are here asserting:

> Religious schools "pursue two goals, religious instruction and secular education." *Board of Education v. Allen, supra,* at 245. And, where carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may assist church-related schools in performing their secular functions, *Committee for Public Education v. Nyquist, post,* at 774, 775; *Levitt v. Committee for Public Education, post,* at 481, not only because the States have a substantial interest in the quality of education being provided by private schools, see *Cochran v. Louisiana Board of Education,* 281 U. S. 370, 375 (1930), but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.
>
> 413 U. S. at 468.

The Court in *Norwood* voided the state statute because the schools followed an avowed discriminatory admissions policy which could not be isolated from the legitimate educational functions also performed. This Court said:

> However narrow may be the channel of permissible state aid to sectarian schools, Nyquist, supra; Levitt, supra, it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system.
>
> 413 U. S. at 470.

Thus, the trial court's recognition of permissible state assistance to the secular aspect of education and the channeling of that assistance to parents and children rather than schools, is totally supported by prior decisions of this Court.

—o—

CONCLUSION

Defendant Intervenor-Respondents respectfully submit that this case does not warrant review by this Court. The three-judge court merely applied established precedent to a statute and set of facts substantially similar to that contained in prior case law. The Court should grant the motion to either dismiss the appeal or affirm the judgment below.

Respectfully submitted,

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GORDON W. SHUMAKER

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and

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SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Minnesota Civil Liberties Union, et al.,

Plaintiffs,

vs.

Howard Casmey, et al.,

Defendants.

C O M P L A I N T

(File No. 3-76-8)

RELIEF SOUGHT:

1. Declare Chapter 396 of Laws of Minnesota 1975 unconstitutional;

2. Declare the regulations promulgated by the Minnesota State Board of Education pursuant to Chapter 396 unconstitutional;

3. Enjoin James Lord, State Treasurer, from spending any State funds under the Statute.

C O M P L A I N T

JURISDICTION

1. This is a civil action brought by the plaintiffs, on their own behalf, and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of funds of the State of Minnesota, to finance the operations of schools owned and controlled by religious oganizations and organized for and

engaged in the practice, propogation and teaching of religion and to declare such use violative of the First and Fourteenth Amendments to the United States Constitution.

2. Jurisdiction is conferred in this Court pursuant to Title 28, U. S. C., Sections 1343 (3), 2201, 2202, 2281, 2284 and Title 42 U. S. C. § 1983.

3. Plaintiffs request that a District Court of three Judges be convened in accordance with the provisions of Title 28, U. S. C., § 2281 and § 2284. Such a Court is required for the hearing and determination of this action since relief is sought to restrain State officers or officials from the enforcement of a statewide statute that allegedly conflicts with the federal Constitution. Plaintiffs seek to enjoin the defendants from using funds of the State of Minnesota to finance the operations of schools owned and controlled by religious organizations and organized for and engaged in the practice, propogation and teaching of religion. Defendants are about to take such action pursuant to Chapter 396, Laws of Minnesota, 1975, and regulations adopted pursuant thereto by the Minnesota State Board of Education members of which are defendants herein, which plaintiffs contend is a law respecting an establishment of religion in violation of the First and Fourteenth Amendments of the United States Constitution. Thus, a three Judge Court would need to decide the claims raised by the plaintiffs.

4. Each of the individual plaintiffs is a citizen of the United States and a resident of the State of Minnesota. Each pays various taxes in and to the State of Minnesota.

5. Each of the organizational plaintiffs are organizations which are interested in maintaining the separation

of Church and State, as well as the quality and existence of the public schools of the State of Minnesota and each have members who are residents and taxpayers of the State of Minnesota.

6. Defendant Howard Casmey is the Commissioner of Education of the State of Minnesota and is sued in such capacity. Defendant James Lord is the Treasurer of the State of Minnesota and is sued in that capacity. Defendants Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, and Henry G. Tweten are members of the State Board of Education of the State of Minnesota, and they are sued in that capacity.

FACTUAL ALLEGATION

7. On June 4, 1975, the Governor of Minnesota signed into law Chapter 396, Laws of Minnesota, 1975, providing for the payment to public school districts or intermediary units of tax-raised funds to pay for auxiliary services provided by them to nonpublic schools, and providing for the purchase, with tax-raised funds, of textbooks, instructional equipment and instructional materials to be loaned to and used in nonpublic schools.

8. Subsequent thereto and at the direction and behest of the Governor of the State of Minnesota, the defendant members of the State School Board, over a period of months, held numerous hearings regarding the adoption of regulations pursuant to said Statute, but excluding certain sections thereof. Said hearings were attended and participated in by various representatives of religious and religious educational organizations.

9. Subsequent thereto, said defendant members of the Board of Education of the State of Minnesota did adopt Chapter 37 of the Regulations of the State Board of Education authorizing the expenditure of funds pursuant to Chapter 396 of Laws of Minnesota, 1975 for the purchase of textbooks and auxiliary materials.

10. Plaintiffs are informed and verily believe that the funds to be allocated thereunder on a per pupil basis will exceed in numerous instances the per pupil allocation of funds for similar services to be provided for students in the public schools in various districts within the State of Minnesota.

11 Plaintiffs are informed and verily believe that said statute and regulations will require numerous administrative decisions and actions by the State Board of Education as well as various local school boards and administrators regarding the allocation of funds and the purchase of material which will necessarily entangle said officials in the affairs and policies of the private and parochial schools whose students are to receive the goods and materials described therein.

12. Chapter 396, Laws of Minnesota, 1975 authorizes and directs payments from state funds to public school districts or intermediary units, which are required to provide books, equipment, materials and services to schools which:

A. Are controlled by churches or religious organizations;

B. Have as their purpose the teaching, propogation and promotion of a particular religious faith;

C. Conduct their operations, curriculums and programs to fulfill that purpose;

D. Require attendance in theology and religious doctrine;

E. Limit admission on the basis of religion;

F. Require attendance at or participation in religious worship;

G. Are an integral part of the religious mission of the sponsoring church;

H. Have as a substantial or dominant purpose the inculcation of religious values;

I. Impose religious restriction on what the faculty may teach.

13. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

CAUSE OF ACTION

14. Chapter 396, Laws of Minnesota 1975 and the regulations adopted pursuant thereto, is a law respecting an establishment of religion in violation of the First Amendment of the United States Constitution in that it:

A. Constitutes governmental financing and subsidizing of schools which are controlled by religious bodies, organized for and engaged in the practice, propogation and teaching of religion;

B. Constitutes governmental action whose purpose and primary effect is to advance religion;

C. Gives rise to an excessive governmental involvement in and entanglement with religion;

D. Gives rise to and intensifies political fragmentation and devisiveness along religious lines.

PRAYER FOR RELIEF

Plaintiffs pray that the following relief be granted:

A. Chapter 396, Laws of Minnesota, 1975 be declared unconstitutional because it is a law respecting establishment of religion in violation of the First Amendment and the Fourteenth Amendment to the United States Constitution;

B. That defendants, James Lord and Howard Casmey, be enjoined from approving or paying any funds of the State of Minnesota pursuant to Chapter 396, Laws of Minnesota, 1975, and the regulations adopted pursuant thereto;

C. That defendant members of the State Board of Education be enjoined from promulgating any further rules or regulations for the administration of Chapter 396, and that the rules and regulations already adopted pursuant thereto be declared unconstitutional.

D. That a preliminary injunction, pending the trial of the issues, be granted to the plaintiffs against the defendants for the relief sought herein.

E. That the plaintiffs be granted such other and further relief as the Court may deem just and proper herein.

/s/ William I. Kampf
Attorney for Plaintiffs
310 Empire Building
Saint Paul, Minnesota 55101
227-8209

Of Counsel:

Randall Tigue
Minnesota Civil Liberties Union

JOINT ANSWER

(Civil Action File No. 3-76-8)

Defendants, for their Answer to the Plaintiffs' Complaint herein, admit, deny, and allege as follows:

1. Admit that this is a civil action brought by the plaintiffs for a temporary and permanent injunction against the allocation and use of certain funds of the State of Minnesota and to declare such use violative of the First and Fourteenth Amendments to the United States Constitution; deny the remaining allegations contained in paragraph 1 of the complaint.

2. Deny the allegations contained in paragraph 2 of the complaint.

3. Admit that plaintiffs request the convention of a three-judge court; affirmatively allege that a three-judge court is not required to adjudicate this matter; deny the remaining allegations contained in paragraph 3 of the complaint.

4. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of the complaint.

5. Admit the allegations contained in paragraph 6 of the complaint.

6. Admit that on June 4, 1975, the Governor of Minnesota signed into law Minn. Laws 1975, ch. 396; to the extent the allegations contained in paragraph 7 of the complaint purport to explain provisions of Minn. Laws 1975, ch. 396, defendants refer the Court to the official text thereof.

7. Deny that the defendant members of the State Board of Education held numerous hearings at the direction and behest of the Governor of the State of Minnesota; admit the remaining allegations contained in paragraph 8 of the complaint.

8. Admit that defendant members of the State Board of Education did adopt Chapter 37 of the Regulations of the State Board of Education; to the extent that the allegations of paragraph 9 of the complaint purport to explain provisions of said Chapter 37, defendants refer the Court to the official text thereof, a true and correct copy of which is attached hereto as Exhibit "A".

9. Deny the allegations contained in paragraphs 10, 11, 12, 13 and 14 of the complaint.

10. Except as expressly admitted, denied, or otherwise qualified hereinabove, deny each and every allegation, matter, fact, and thing contained in the complaint.

SEPARATE DEFENSES

11. Allege that the Court lacks jurisdiction of the subject matter of this action.

12. Allege that the complaint fails to state a claim upon which relief can be granted.

13. Allege that this action is not ripe for adjudication.

14. Allege that the Court should abstain from hearing this action.

15. Allege that plaintiffs have failed to exhaust their legislative remedies.

WHEREFORE, defendants pray that plaintiffs take nothing by their complaint, that plaintiffs' complaint be dismissed, and that defendants be awarded their costs and disbursements herein.

Dated: February 3, 1976.

Warren Spannaus
Attorney General
State of Minnesota

Richard G. Mark
Assistant Solicitor General

James P. Gerlach
Special Assistant Attorney General

By /s/ Michael J. Bradley
Special Assistant Attorney General

And /s/ Mark B. Levinger
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Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(Civil File No. 3-76-8)

Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,

Plaintiffs,

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota,

Defendants,

and

David and Julaine Wachholz, individually, and Amy, Michael and Laurel Wachholz, minor children, by their parents and natural guardians, David and Julaine Wachholz; James P. Larkin, individually, and Ann, Matthew, Thomas, Mary, Cecilia, Joan, Eileen, Gregory, John and Margaret Larkin, minor children, by their parent and natural guardian, James P. Larkin; Willis Weiberdink, individually, and Joan, Jan, and Wesley Weiberdink, minor children, by their parent and natural guardian, Willis Weiberdink; Robert W. and Rosemary Geist, individually, and Robert W., Jr., Rosemary, Christopher, and Harry Geist, minor children, by their parents and natural guardians, Robert W. and Rosemary Geist,

Applicants for Intervention.

ANSWER OF INTERVENOR DEFENDANTS DAVID AND JULAINE WACHHOLZ, ET AL.,

Come now Intervenor Defendants David and Julaine Wachholz, et al., and for their Answer to the Complaint of Plaintiffs herein, state and allege as follows:

IDENTIFICATION OF INTERVENORS

David and Julaine Wachholz, James P. Larkin, Willis Weiberdink and Robert W. and Rosemary Geist are residents and taxpayers of the State of Minnesota, and being parents of minor children, enrolled in nonpublic schools in the State of Minnesota, are the recipients of state assistance in the form of instructional materials, equipment and auxiliary services pursuant to Chapter 396 of the Laws of Minnesota, 1975.

Amy, Michael and Laurel Wachholz, through their parents and natural guardians, David and Julaine Wachholz, Ann, Matthew, Thomas, Mary, Cecelia, Joan, Eileen, Gregory, John and Margaret Larkin, through their parent and natural guardian James P. Larkin, Joan, Jan and Wesley Weiberdink, through their parent and natural guardian, Willis Weiberdink, and Robert W., Jr., Rosemary, Christopher and Harry Geist, through their parents and natural guardians, Robert W. and Rosemary Geist, are minor children, are enrolled in nonpublic schools in the State of Minnesota and requests have been made by or on behalf of these students for state assistance in the form of the loan of instructional materials for the current year from the local public school district in accordance with Chapter 396 of the Laws of Minnesota, 1975. These same students expect in the future to make requests for the loan of equipment and the use of auxiliary services from their local public school district, also in accordance with Chapter 396 of the Laws of Minnesota, 1975.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The Court lacks subject matter jurisdiction.

THIRD DEFENSE

The action is currently not ripe for adjudication.

FOURTH DEFENSE

The Court should abstain from proceeding further in this matter.

FIFTH DEFENSE

The organizational Plaintiffs have no standing to maintain this action.

SIXTH DEFENSE

1. Deny each and every factual assertion and legal conclusion contained in the Complaint, except that which is specifically admitted or otherwise qualified herein.

2. As to paragraph 1 of the Complaint, admit only that this is a civil action brought by the Plaintiffs for a temporary and permanent injunction against the allocation and use of funds of the State of Minnesota; deny the remainder of said paragraph.

3. Deny paragraph 2 of the Complaint.

4. As to paragraph 3 of the Complaint, admit only that Plaintiffs are requesting that a three-judge court be convened pursuant to 28 U. S. C. Sections 2281 and 2284; deny the remainder of said paragraph.

5. State that they are without information or belief as to the truth or falsity of paragraph 4 of the Complaint, and therefore deny the same.

6. State that they are without information or belief as to the truth or falsity of paragraph 5 of the Complaint, and therefore deny the same; state further that even if the allegations and factual assertions contained in paragraph 5 are true, that said allegations and factual assertions do not confer standing on the organizational Plaintiffs.

7. Admit paragraph 6 of the Complaint.

8. As to paragraph 7 of the Complaint, admit only that on June 4, 1975, the Governor of the State of Minnesota signed into law Chapter 396 of the Laws of Minnesota, 1975; refer the court to the official text of said act as to its contents.

9. As to paragraph 8 of the Complaint, admit only that the Minnesota Department of Education (not the State School Board or its individual members), as a Minnesota state agency within the meaning of the State Administrative Procedures Act, held public hearings on proposed rules and regulations to implement Chapter 396, Laws of Minnesota, 1975; deny the remainder of said paragraph.

10. As to paragraph 9 of the Complaint, admit only that the Minnesota Department of Education has adopted

certain rules and regulations to implement said statute, referred to as Chapter 37, E. D. U. 740-759, that said regulations pertain only to the instructional materials sections of Chapter 396; allege further that said regulations have been approved as to form and legality by the Minnesota Attorney General, and have been filed for record with the Minnesota Secretary of State; state that the court is referred to the official text of said rules and regulations; deny the remainder of said paragraph.

11. Deny paragraphs 10, 11, 12, 13, and 14 of the complaint.

WHEREFORE, Intervenor Defendants David and Julaine Wachholz, et al., pray that the Complaint be dismissed and that said Chapter 396, Laws of Minnesota, 1975, be declared constitutional in all respects, and that Defendants be awarded their costs and disbursements herein.

BRIGGS AND MORGAN

By JOHN R. KENEFICK

Attorneys for Intervenor-Defendants

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(Civil Action File No. 3-76-8)

Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,

Plaintiffs,

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota,

Defendants,

and

Lisa Garcia, Christine Garcia and Julie Anne Garcia, minors, by their father and mother and natural guardians, Ernest Garcia and Lupe Garcia, and Ernest Garcia and Lupe Garcia, individually; Robert E. Slater, III, Joseph F. Slater, Susan C. Slater, Thomas S. Slater, Timothy P. Slater, Sheila M. Slater, and Shannon C. Slater, minors, by their father and natural guardian, Robert E. Slater, Jr., and Robert E. Slater, Jr., individually; Donna Wheaton, a minor, by her mother and natural guardian, Emma Hilliard, and Emma Hilliard, individually; and Leigh Ann Spears and Lisa Spears, minors, by their father and natural guardian, William Spears, and William Spears, individually,

Defendant Intervenors.

ANSWER OF DEFENDANT INTERVENORS LISA GARCIA, ET AL.

Defendant Intervenors, Lisa Garcia, et al., for their joint and separate answer to plaintiffs' complaint, state and allege:

1. That Defendant Intervenors are entitled to benefits provided by Chapter 396, Laws of Minnesota 1975, pursuant to proper applications made to proper administrative agencies for one or more of the educational aids contemplated by the Act.

(a) Ernest Garcia and Lupe Garcia, husband and wife, are taxpayers of the State of Minnesota, residents of St. Paul, Minnesota, and parents and natural guardians of Lisa Garcia, who is enrolled in Grade 6, Project Discovery, St. Peter Claver School, St. Paul, Minnesota, Christine Garcia, who is enrolled in Grade 3, Project Discovery, Cathedral Grade School, St. Paul, Minnesota, and Julie Anne Garcia, who is enrolled in Grade 1, Project Discovery, Cathedral Grade School, St. Paul, Minnesota.

(b) Robert E. Slater, Jr. is a taxpayer of the State of Minnesota, a resident of St. Paul, Minnesota, and the father and natural guardian of Robert E. Slater, III, who is enrolled in Grade 11, St. Thomas Academy, Mendota Heights, Minnesota, Joseph F. Slater, who is enrolled in Grade 10, St. Thomas Academy, Mendota Heights, Minnesota, Susan C. Slater, who is enrolled in Grade 9, Derham Hall, St. Paul, Minnesota, Thomas S. Slater, who is enrolled in Grade 8, St. Mark's School, St. Paul Minnesota, Timothy P. Slater, who is enrolled in Grade 6, St. Mark's School,

St. Paul, Minnesota, Sheila M. Slater, who is enrolled in Grade 4, St. Mark's School, St. Paul, Minnesota, and Shannon C. Slater, who is enrolled in Grade 2, St. Mark's School, St. Paul, Minnesota.

(c) Emma Hilliard is a taxpayer of the State of Minnesota, a resident of St. Paul, Minnesota, and the mother and natural guardian of Donna Wheaton, who is enrolled in Grade 3, Project Discovery, Cathedral Grade School, St. Paul, Minnesota.

(d) William Spears is a taxpayer of the State of Minnesota, a resident of St. Paul, Minnesota, and the father and natural guardian of Leigh Ann Spears, who is enrolled in Grade 4, Project Discovery, Cathedral Grade School, St. Paul, Minnesota, and Lisa Spears, who is enrolled in Grade 1, Project Discovery, Cathedral Grade School, St. Paul, Minnesota.

2. Except as hereinafter expressly admitted, modified, qualified or otherwise answered, defendant intervenors deny each allegation, statement and matter in the complaint.

3. Admit that this is a civil action for declaratory and injunctive relief.

4. Admit that plaintiffs have requested a three-judge panel to hear this action.

5. Admit the allegations of Paragraph 6 of the complaint.

6. Allege that defendant intervenors are without sufficient knowledge or information as to the truth or accuracy of the allegations of Paragraphs 4 and 5 of the complaint,

and therefore, deny the same and put plaintiffs to their strict burden of proof thereof.

7. Specifically deny that this action is properly brought as a class action and further deny that plaintiffs are properly representative of the class referred to in the complaint.

8. Specifically deny that the court has jurisdiction over this action.

9. Specifically deny that a three-judge panel is necessary or proper in this action.

10. With respect to Paragraphs 7 and 9 of the complaint, defendant intervenors refer to the official texts of the statute and regulations mentioned therein and allege that said statute and regulations speak for themselves.

SEPARATE DEFENSES

11. The complaint fails to state a claim upon which relief can be granted.

12. The organizational plaintiffs named in the complaint lack standing to sue.

13. The issues raised by the complaint are not ripe for judicial determination.

14. The federal court should obstain from hearing this action until the state courts have had an opportunity to determine the issues raised therein.

WHEREFORE, Defendant Intervenors, and each of them, pray that the following relief be granted:

1. That the court declare Chapter 396, Laws of Minnesota 1975, and the regulations promulgated pursuant thereto, to be constitutional.

2. That the action in all other respects be dismissed.

3. That Defendant Intervenors be awarded their costs and disbursements herein.

4. That the court award such additional relief as may be necessary and proper.

Meier, Kennedy & Quinn
By: /s/ Timothy P. Quinn
and /s/ Gordon W. Shumaker
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MINNESOTA CIVIL LIBERTIES UNION, ET AL.,
Plaintiffs,

vs.

HOWARD CASMEY, COMMISSIONER OF EDUCATION OF THE STATE OF MINNESOTA, ET AL.,
Defendants,

and

LISA GARCIA, ET AL.; DAVID AND JULAINE WACHHOLZ, ET AL.,
Intervenors.

AFFIDAVIT OF ROSEMARY A. SOMMERVILLE

ROSEMARY A. SOMMERVILLE, being first duly sworn, deposes and says as follows:

1. I am currently and have been since February 3, 1976, the consultant for Nonpublic Pupil Aid for the Minnesota Department of Education. My duties include the administration of Minn. Stat. §§ 123.931-123.937 (Supp. 1975) (hereinafter "Nonpublic Pupil Aid") for the Department of Education.

2. A review of the files and records in my possession indicates that:

(a) Over 70,000 Minnesota nonpublic school pupils will receive Nonpublic Pupil Aid during the fiscal year ending June 30, 1976.

(b) During the fiscal year ending June 30, 1976, the State of Minnesota will expend approximately $4.15 million, excluding administrative costs, pursuant to Minn. Stat. §§ 123.931-123.937 (Supp. 1975). As of May 14, 1976, approximately $1.14 million, or 27%, of the total amount will have been disbursed by the State.

(c) On file at the State Department of Education are all applications for Nonpublic Pupil Aid submitted by nonpublic schools on behalf of nonpublic pupils. These applications summarize the individual "Pupil Request Form" (copy included as the last page of "Guidelines" of the State Department of Education) submitted by each pupil to that pupil's nonpublic school indicating whether or not the pupil wishes to participate in the Nonpublic Pupil Aid program. The applications submitted by at least 55 nonpublic schools

reveal that some pupils attending those schools did not indicate a desire to participate in the program. A few examples of such schools follow:

NonPublic School	Total Pupils Enrolled	Pupils Participating
1. St. Austin School, Minneapolis	317	290
2. Immanuel Lutheran, St. Paul	132	120
3. Stewartville Christian School, Stewartville	120	92
4. Minnehaha Academy, Minneapolis	707	525

(d) Nearly 3,500 pupils receiving Nonpublic Pupil Aid during the fiscal year ending June 30, 1976 attend nonpublic schools which are not owned or operated by religiously-affiliated institutions.

3. I have read the foregoing affidavit, know the contents thereof, and the same is true of my own knowledge.

FURTHER AFFIANT SAYETH NOT.

/s/ Rosemary A. Sommerville

Subscribed and sworn to before
me this 7 day of May, 1976.

/s/ Myrtle A. Benson
Notary Public, Ramsey County, Minnesota.
My Commission Expires June 14, 1977.

AFFIDAVIT OF ROSEMARY SOMMERVILLE

(Civil File No. 3-76-8)

ROSEMARY SOMMERVILLE, being first duly sworn on oath, deposes and says as follows:

1. I am employed by the Department of Education, State of Minnesota, as a consultant for the nonpublic pupil aid program conducted under Minn. Stat. §§ 123.931 to 123.937 (Supp. 1975).

2. Prior to being employed by the Department of Education, I spent four years teaching primarily English and History in Saint Paul and Duluth, and one year as an interning Assistant Principal at Prior Lake.

3. A review of the files and records in my possession indicates that:

(a) for the 1975-76 school year, 163 of the 440 public school districts have nonpublic pupils within their districts that participated in the nonpublic pupil aid program.

(b) Within the 163 public school districts there were 389 nonpublic schools where nonpublic pupils participated in the aid program.

4. During March, April and May of 1976, I visited 23 public school districts and 36 nonpublic schools located within those districts.

5. While the nonpublic schools selected for a visit were chosen at random, the selection process was designed to ensure that the sample included both large and small schools located in both large and small communities. The sample also included a variety of religious affiliations.

6. The procedures followed during the visitations were as follows:

(a) The public and nonpublic schools were given approximately one week's notice of my intention to make a visit.

(b) I first visited the public school and reviewed all invoices pertaining to materials loaned to nonpublic pupils.

(c) In almost all instances I recognized the materials listed on the invoices as being similar to those used in other public school districts.

(d) In those few instances where I did not recognize an item listed on the invoice, I would request an explanation of what the material was from the public school to ensure that the material was secular, neutral, and nonideological.

(e) I also visited the selected nonpublic schools and viewed:

(i) The forms requesting participation in the program.

(ii) Any item that had been listed on an invoice that I did not recognize and for which a satisfactory explanation was not provided by the public schools.

(iii) A sample of the items loaned by the public school to ensure that the items were properly stamped as being the property of the public school district, and to ensure that the items were actually being used by individual nonpublic pupils.

7. During my visits I encountered no material loaned under the program which was not secular, neutral and nonideological.

8. I have read the foregoing affidavit, know the contents thereof, and the same is true of my own knowledge.

FURTHER AFFIANT SAYETH NOT.

Dated: September 24, 1976.

/s/ Rosemary Sommerville

Subscribed and sworn to before
me this.....day of
September, 1976.

.....

Notary Public

IN THE

Supreme Court of the United States

October Term 1976

No. 76-1144

MINNESOTA CIVIL LIBERTIES UNION, ET AL.,
Plaintiffs/Appellants,

vs.

HOWARD CASMEY, Commissioner of Education of the State of Minnesota, et al.,
Defendants/Respondents.

MOTION TO DISMISS OR AFFIRM

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Defendants/Respondents.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, Appellees respectfully move that the appeal herein be dismissed or, in the alternative, that the judgment of the United States District Court for the District of Minnesota be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

BRIEF IN SUPPORT OF MOTION

CITATION TO OPINION BELOW

The opinion of the District Court has not been officially reported. A copy thereof is set forth in the appendix to appellants' Jurisdictional Statement at A-1 to A-16.

QUESTION PRESENTED

Have appellants raised a substantial federal question as to the constitutional validity of Minn. Laws 1975, ch. 396 which provides for the loan of secular textbooks and other instructional materials to students in non-public schools?

I.

STATEMENT

This is a direct appeal from a judgment, entered on November 30, 1976, of a three-judge district court convened pursuant to 28 U.S.C. § 2284 (1965). By its decision, the District Court rejected appellants' claim that Minn. Laws 1975, ch. 396[1] violates the establishment clause of the first and fourteenth amendments of the United States Constitution.

The Act was passed by the Minnesota Legislature in 1975 and became effective on July 1, 1975. The stated policy underlying the Act is to

> . . . provide for distribution of educational aids such as auxiliary services, instruction materials and equipment

[1] The text of Minn. Laws 1975, ch. 396, which is codified as Minn. Stat §§ 123.931-123.937 (1976) is set forth in the appendix to appellants' Jurisdictional Statement at A-19 to A-25. Hereinafter it is referred to as "Chapter 396" or the "Act."

> so that every school child in the state will share equitably in education benefits and therefore assure all Minnesota students and their parents freedom of choice in education.

Minn. Laws 1975, ch. 396 § 1.

The three operational sections of the Act (sections 3-5) direct the State Board of Education to promulgate rules to implement the Act. As of this date, only rules implementing the section[2] which requires local public school districts to provide or loan instructional materials[3] to non-public school pupils have been promulgated. The State Board has not promulgated rules relating to the sections of the Act which would provide equipment or auxiliary services to nonpublic school pupils. *See* chapter 396 §§ 4 and 5.

The Act further requires the Commissioner of Education to allot to each school district its entitlement to State appropriated funds under the Act. Chapter 396, § 3. In determining this allotment, the cost per pupil unit of materials provided to non-public pupils cannot exceed the statewide average cost per pupil unit spent on the same materials by the public school systems in the state. *Id.*

[2] Minn. Reg. EDU 740-744, which are appended hereto at A-1 to A-5. It should be noted that appellants have appended a set of rules and regulations to their Jurisdictional Statement that were not adopted by the State Board of Education.

[3] "Instructional materials" are defined in section 2, subdivision 1 of the Act to include ". . . only such secular, neutral and non-ideological instructional materials . . ." as are available or normally provided to Minnesota public school students. Such materials are divided into the categories of "textbooks," "school library and audiovisual materials," and "instruction supplies".

II.

ARGUMENT

In their Jurisdictional Statement, as in the District Court below, appellants have attacked Chapter 396 on almost every conceivable constitutional ground. Their arguments, however, are either plainly unmeritorious or raise no issue which has not been previously determined by this Court. Plenary consideration of this appeal is unwarranted in view of the unsubstantiality of the issues raised by appellants.

A. Introduction

Appellees respectfully submit that Chpater 396 is valid under the now familiar three-part test applied by this Court in several recent establishment clause cases. *See e.g., Committee For Public Education And Religious Liberty vs. Nyquist,* 413 U.S. 756, 772-773 (1973) (hereinafter "*PEARL v. Nyquist*"); *Lemon v. Kurtzman,* 403 U.S. 602, 612-613 (1971). *First.* Does the Act have a secular legislative purpose? *See Epperson vs. Arkansas,* 393 U.S. 97 (1968). *Second.* Does the Act have a "primary effect" that neither enhances nor inhibits religion? *See School District of Abington Township vs. Schempp,* 374 U.S. 203 (1963). *Third.* Does the Act and its administration avoid excessive government entanglement with religion? *See Walz v. Tax Commissioner,* 397 U.S. 664 (1970).

In applying the above test, it must be remembered that appellants must also overcome the strong presumption of constitutionality that is afforded state statutes. As this Court explained in *Schilb v. Kuebel,* 404 U.S. 357, 364 (1971), federal courts should set aside state legislative acts only if no conceivable grounds can be found to justify them.

B. The Minnesota act has a secular legislative purpose.

The stated purpose of the Act, as enunciated in Chapter 396 § 1, is to provide equal education benefits to all school children in Minnesota and to assure all Minnesota students and their parents freedom of choice in education. Appellants have conceded that the Act is intended to serve an adequately secular purpose and, therefore, that issue is not presently before this Court. *See* Memorandum Opinion at A-8 of appellants' Jurisdictional Statement.

C. The primary effect of the act neither advances nor inhibits religion.

This Court in prior establishment clause cases has set forth the following standards for determining whether the primary effect of a statute is impermissibly to aid in the establishment of religion:

1. Does the aid go directly to the non-public school, instead of to the non-public school pupils or to their parents? *PEARL v. Nyquist,* 413 U.S. 756, 781 (1973).
2. Is the aid specifically directed to a special class of non-public beneficiaries, or does the aid go to all school children, both public and non-public? *Meek v. Pittenger,* 421 U.S. 349, 362, n. 12 (1975); *see PEARL v. Nyquist, supra,* 413 U.S. at 782, n. 38; *Sloan v. Lemon,* 413 U.S. 825, 832 (1973).
3. Has the aid been restricted to the secular portion of the non-public schools function? *Tilton v. Richardson,* 403 U.S. 672, 673-680 (1971); *see PEARL v. Nyquist, supra,* 413 U.S. at 775.

When measured against these standards, it becomes manifestly clear that the "primary effect" of the Act is to provide

secular education to non-public school pupils and not to directly advance or aid the establishment of religion.

1. *The Act provides that state aid is given to non-public school pupils rather than to the non-public schools themselves.*

The fact that aid directly benefits parents and pupils, rather than benefiting the non-public schools, is an important factor in favor of the constitutionality of a statute. *Board of Education vs. Allen*, 392 U.S. 236, 243 (1968); *PEARL v. Nyquist*, *supra*, 413 U.S. at 781-783; *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971); *Walz v. Tax Commissioner*, 397 U.S. 664, 675 (1970). The Act has been carefully structured to ensure that state aid is given to non-public school children, rather than to the non-public school itself. In addition, the rules adopted by the Minnesota State Board of Education require each non-public school pupil to file an application if he wishes to participate in the program.[4] A non-public school on its own cannot file an application on behalf of its pupils. In fact, in numerous instances, some non-public school children within a particular non-public school have applied for and are participating in the program while other children within the same school are not participating.[5] Thus, the recipient of aid under the Act is clearly the child or parent, rather than the school.

In support of their claim that the aid under the Act goes to the schools and not to the pupils, appellants have urged an erroneous interpretation of the "child benefit theory".[6] In this

[4] Minn. Reg. Edu 743 at A-3.

[5] Affidavit of Rosemary A. Sommerville, paragraph 2(c) which was appended to Defendant State of Minnesota's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion For a Preliminary Injunction And in Support of Defendants' Motion to Dismiss the Organizational Plaintiffs, dated August 20, 1976.

[6] Appellants' Jurisdictional Statement at 13-14, and 21.

regard, appellants allege that in the past the schools, and not the pupils, have supplied instructional materials and supplementary textbooks such as workbooks. Therefore, appellants contend that the aid in question is directed to the school rather than to the pupils.

This argument, however, must be rejected for at least two reasons. First, there are no facts in the record which support the allegation that the pupils have not supplied such materials in the past. More importantly, the distinction which appellants seek to draw is without constitutional significance. It has long been the rule that neutral, nonideological aid may be channeled to the secular educational functions of parochial schools without providing direct aid to the religious function of those schools. Such aid is constitutionally permissible even though the availability of the aid may serve indirectly and incidentally to promote the religious function of certain schools by rendering it more likely that children would attend parochial schools or by freeing the budgets of those schools for use in nonsecular areas. *PEARL vs. Nyquist, supra*, 413 U.S. at 775; *see Tilton v. Richardson, supra*, 403 U.S. at 679; *Board of Education v. Allen, supra*, 392 U.S. at 243-244; *Everson v. Board of Education*, 330 U.S. 1, 16-17 (1947).

The type of aid provided by Chapter 396 is no different than the type of aid sustained in *Everson v. Board of Education*, *supra*. It is highly unlikely that the non-public pupils in *Everson* paid for the bus transportation in a more direct fashion than the non-public pupils paid for instructional materials and supplementary textbooks in Minnesota prior to the passage of the Act. In the instant matter, as in *Everson*, the pupils either paid for the materials directly or did so indirectly through tuition payments. The distinction that must be drawn is that the type of aid authorized by Chapter 396 § 3, is not

in the nature of a capital improvement or equipment to the school which would benefit the school itself more directly than the individual pupils. Instead, the type of assistance authorized by the Act is directed to the pupils requesting the aid and is clearly designed to benefit individual pupils rather than the non-public schools which they attend.

Accordingly, the contentions of appellants are without merit, and the Act is clearly constitutional under this portion of the "primary effect" standard.

2. *The Act does not create a special class of beneficiaries, but merely equalizes benefits to children in public and non-public schools.*

The portion of Chapter 396 relating to the provision of textbooks to non-public school pupils is constitutionally indistinguishable from a similar Pennsylvania statute which was held constitutional in *Meek v. Pittenger*, 421 U.S. 349 (1975). In upholding the Pennsylvania law, this Court relied on its earlier decisions in *Board of Education v. Allen, supra*, and *Everson vs. Board of Education, supra*. More importantly, this Court in *Meek v. Pittenger*, reiterated its earlier statement in *Board of Education v. Allen* that the New York textbook law under consideration:

> [M]erely makes available to all children the benefits of a general program to lend schoolbooks free of charge. Books are furnished at the request of the pupils and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.

Meek v. Pittenger, supra, 421 U.S. at 360, quoting *Board of Education v. Allen, supra*, 392 U.S. at 243-244.

Free textbooks have been mandated for Minnesota public school students since 1959. Minn. Stat. § 123.35, subd. 10 (1976). That policy was recently reemphasized by passage of the "Minnesota Public School Fee Law," Minn. Stat. §§ 120.71-120.76 (1976), which specifically prohibits local school boards from charging fees for textbooks. Thus, by making textbooks available to non-public school pupils, the Act merely bestows the benefits of Minnesota's longstanding policy of providing free textbooks to *all* Minnesota school children and is materially indistinguishable from the textbook loan programs approved in *Meek v. Pittenger* and *Board of Education v. Allen*.

The non-textbook portions of the Act authorize local school districts to loan or provide "instructional supplies" and "school library and audiovisual materials" to non-public school pupils. The Minnesota Public School Fee Law also prohibits local school districts from charging public school pupils fees for a substantial majority of these materials. Minn. Stat. § 120.74 subd. 1 (1976). Thus, the non-textbook and the textbook portions of the Act are closely analogous in that both merely make available to all children the benefits of a general program of free instructional materials.

Nevertheless, appellants contend that the Act does not satisfy the requirement of providing equal benefits because certain accounting practices had resulted in additional funds being placed into the formula used for determining the amount of aid available to each individual non-public student.[7] In its decision, the District Court agreed in part with appellants' contentions and ordered the State of Minnesota to alter its accounting procedures to eliminate alleged unequal benefits.

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[7] Appellants' Jurisdictional Statement at 17-18.

In response to this order, the State of Minnesota, on February 7, 1977, served by mail upon appellants proposed changes to the accounting procedures which should eliminate the concerns expressed by the District Court. Therefore, appellants' concerns over unequal benefits should no longer exist. However, should appellants still have concerns over unequal benefits caused by accounting procedures, those concerns should be addressed in the first instance to the appellees and the District Court rather than to this Court.

Therefore, the contentions of appellants do not merit plenary consideration.

3. *Aid under the Act is restricted to the secular functions of Minnesota non-public schools.*

This Court has recognized that the processes of secular and religious training in sectarian schools are not so intertwined that secular textbooks furnished by the State to students attending sectarian schools are in fact instrumental in the teaching of religion. *Tilton v. Richardson, supra,* 403 U.S. at 681; *Lemon v. Kurtzman, supra,* 403 U.S. at 616-617; *Board of Education v. Allen, supra,* 392 U.S. at 248. The Minnesota Legislature, also aware of the interactions of secular and religious training in sectarian schools, carefully designed the Act so as not to aid the religious mission of any religiously-affiliated non-public school. Indeed, Chapter 396, section 2 defines "instructional materials" to include only:

> . . . such secular, neutral and non-ideological instructional materials as are available and are of benefit to Minnesota public school students . . . .

All instructional materials, including textbooks, provided pursuant to Chapter 396 § 3 are "self-policing," in that if the

instructional materials initially qualify as being secular, non-ideological and neutral, they, being inanimate objects, will not become sectarian as they are used in the sectarian schools. As such, they are incapable of diversion to religious use. *See Meek v. Pittenger, supra,* 421 U.S. at 365.

Appellants, however, contend that there is insufficient policing of the Act by public officials to prevent the supplying of aid to the sectarian portion of the private schools.[8] Such a contention is without support in law or fact.

Chapter 396 is administered in a manner identical to that upheld by this Court in *Board of Education v. Allen, supra,* a decision that was subsequently reaffirmed in *Meek v. Pittenger, supra.* As in the instant matter, the statutory scheme at issue in *Allen* did not require either placement on an approved list prior to the loan[9] or state board approval, but only subsequent approval by a local board of education.[10]

Appellants further contend that the definition of textbooks under the Act permits a greater potential for diversion of textbooks to religious use than in the textbook loan program sustained in *Meek v. Pittenger, supra.*[11] However, a brief comparison of the pertinent statutory language clearly indicates that this contention is erroneous. In *Meek v. Pittenger,* "textbooks" were defined by the Pennsylvania statute as ". . . *a* principle source of study material for a given class . . . ." 421 U.S. at 354, n. 3 (emphasis added). In comparison, Chapter 396 § 2 subd. 1 specifically limits eligible textbooks to those ". . . available for the individual use of each pupil in such class or group . . ." which is clearly a tighter restriction than

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[8] Appellants' Jurisdictional Statement at 9-12.
[9] See Meek v. Pittenger, *supra,* 421 U.S. at 361-362, n. 11.
[10] Board of Education v. Allen, *supra,* 392 U.S. at 239, 255-256.
[11] Appellants' Jurisdictional Statement at 20.

that imposed by the statutes upheld in either *Meek v. Pittenger* or *Board of Education v. Allen, supra.* If a particular textbook is supplied to every student in a particular class and qualifies as an eligible "textbook" under the Act, then certainly that textbook would also qualify as ". . . a principle source of study material for a given class . . ."

Appellants' contention that there is inadequate policing of the Act is also without foundation in fact. Appellants have failed to discuss the general administrative responsibilities of the State Department of Education as outlined in the Department's Rules and Regulations.[12] Further, appellants also ignore the fact that an employee of the State Department of Education visited a random sampling of non-public schools participating in the Act during the 1975-76 school year during which she inspected invoices at the local public school districts and examined materials provided by the public school districts to non-public school students.[13] Moreover, that employee specifically verified that all textbooks which had been provided at the schools which were visited were "secular, neutral, and nonideological."[14]

Finally, it should be noted that appellants' assertions as to the alleged inadequate policing of the Act are apparently premised upon a questionnaire which purports to show that local public school districts are exercising inadequate control in reviewing and approving textbooks.[15] However, appellees have disputed both the accuracy and the relevancy of the results of that questionnaire before the District Court on several

[12] Minn. Reg. EDU 742, A-2.

[13] *Supra*, footnote 5, Affidavit of Rosemary A. Sommerville, dated September 24, 1976, paragraphs 3-5.

[14] *Id.* at paragraphs 5(d) and 6.

[15] A copy of the questionnaire is attached to an affidavit of appellants' attorney, William I. Kampf, dated September 21, 1976.

grounds.[16] In summary, the Act as written and implemented has a primary effect that does not advance religion. The state aid provided pursuant to that Act: (1) is dispersed directly to non-public school pupils, instead of to the non-public schools themselves; (2) is dispersed to all pupils, both public and non-public, and is not directed to a specific class of non-public beneficiaries; and (3) is restricted to the secular portion of the non-public schools' functions. Therefore, the Act is part of a general program to provide certain secular benefits to all school children in the State and meets the "primary effect" test as enunciated by the United States Supreme Court in recent establishment clause cases.

D. The administration of the act fosters minimal entanglement between the state and religiously-affiliated non-public schools.

The final test in determining the constitutionality of Chapter 396 is to determine whether the Act and its administration involve excessive governmental entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). A close examination of the relationships between the State and sectarian schools created by the Act indicates that the potential and actual "entanglement" between the State and any religiously-affiliated schools whose students receive aid under the Act is, at most, very minimal.

The actual administration of the Act involves relatively few interactions between religiously-affiliated schools and the State, and nearly all interactions are of an insignificant ministerial nature. Initial application is made by the non-public

[16] For a discussion at length of the inadequacies of appellants' questionnaire, see State Defendants' Reply Brief, October 15, 1976, at 6-9.

school pupil or his parent to the non-public school.[17] Each non-public school then forwards a summarizing application to the local school district.[18] Each non-public school maintains an inventory list of materials which is kept on file at the local school district.[19] Each local school district may claim reimbursement from the State for actual expenses and administrative costs.[20]

Materials for which reimbursement is allowed are carefully delineated in Chapter 396 § 2 subd. 1. The State therefore does not have to conduct an examination of the materials prior to authorizing reimbursement. To the extent that any examinations do occur by either the State or the local school districts, they do not result in excessive entanglement. *Board of Education v. Allen*, 392 U.S. 236 (1968).[21]

The textbook provisions of the Act are in every material respect identical to the textbook loan programs approved by this Court in *Meek v. Pittenger, supra,* and *Board of Education v. Allen, supra,* and therefore administration of the Minnesota program will involve no greater entanglement than that already approved by this Court.

Similarly, the term "instructional materials" is defined by the Act to include only those materials ". . . as are available and are of benefit to Minnesota public school students . . ." Chapter 396 § 2 subd. 1. Administratively, it is a simple matter to approve for reimbursement only those instructional materials currently in use in public schools, a system explicitly

[17] Minn. Reg. EDU 743(a) at A-3.
[18] *Id.* The State Department of Education determines the statistical allocation of aid; the local school district purchases the actual materials. Minn. Reg. EDU 743(b), and (c) at A-3.
[19] Minn. Reg. EDU 743(d) at A-3.
[20] Minn. Reg. EDU 743(g) at A-4.
[21] The statutory scheme approved in Board of Education v. Allen permitted approval by the State subsequent to the actual loan of textbooks. *See* discussion *supra* at 11.

approved in *Meek v. Pittenger, supra,* 421 U.S. at 361, and in *Board of Education v. Allen, supra,* 392 U.S. at 269-272 (Fortas, J., dissenting). Accordingly, the process of reimbursement requires no interference by the State at all in the religious affairs of the non-public schools.

In a recent decision, *Roemer v. Board of Public Works,* 426 U.S. 736 (1976), this Court approved a statutory scheme which authorized direct monetary grants to institutions of higher learning in Maryland, including those with religious affiliations. There were no restrictions on the use of funds other than that they could not be used for "sectarian purposes." To ensure compliance, the State of Maryland, through its Council for Higher Education, required substantial documentation as to use of the funds and established regulatory procedures involving significant interactions between the state agency and the institution recipients.[22] The administrative entanglement created by the Maryland statutory and regulatory scheme, which went as far as to authorize a possible audit of the institution, is far greater than any administrative entanglement either contemplated or realized under the Minnesota statute in question.

Based upon the actual circumstances underlying the administration of the Act and the pertinent legal authorities described above, it is clear that the two remaining arguments set forth by appellants with regard to entanglement are with-

[22] Each institution's chief executive officer was required to submit affidavits of compliance with the law and descriptions of the specific uses for the funds both before and after the fiscal year in which the funds were expended. The institutions had to segregate the state funds into separate revenue accounts. The Maryland Council for Higher Education had final authority to determine what constituted a "sectarian purpose" and could audit the institution's books if needed. Roemer v. Board of Public Works 426 U.S. 736, 741-743 (1976).

out merit. First, appellants' contention that the "failure to articulate the nature of state sectarian school relations activates a presumption of entanglement"[23] is clearly without foundation in light of the minimal contact that the Act requires with non-public schools. Second, appellants further contend that a localized decision-making process magnifies administrative entanglement and political divisiveness.[24] However, there is nothing in the record to indicate that the sort of pressure that would lead to political divisiveness has occurred in any instance under the Act. Furthermore, the process for approving a textbook at the local level does not vary if the number of textbooks approved is increased. More importantly, however, it is difficult to perceive of any constitutional significance in the fact that the book must be approved by a local administrator rather than a statewide administrator.

In conclusion, appellants have failed to show any specific example of, or necessity for, excessive entanglement of the State into the affairs of religiously-affiliated schools. Any state involvement in the religious affairs of non-public schools resulting from administration of the Act is minimal at best and is within established constitutional limits.

E. Auxiliary aids and equipment.

Chapter 396 §§ 4 and 5, which would have provided equipment and auxiliary services to non-public students, have not been implemented at this time. Before those provisions may take effect, it would be necessary for the Department of Education to promulgate rules and regulations under the State Administrative Procedures Act. That process would require

[23] Appellants' Jurisdictional Statement at 15.
[24] *Id.* at 16.

at least 180 days from the time at which the rules were written and proposed for a hearing. For reasons of judicial economy, the District Court declined to rule on those two provisions of the State statute and also explained that "[b]ecause constitutional application may be possible, the Court cannot find them officially unconstitutional."[25] In addition, appellees promised the District Court that before either statutory provision were implemented appellants would be granted ample opportunity to seek judicial review.

The State of Minnesota has no intention of promulgating rules or regulations for either the loan of equipment or the provision of auxiliary services until such time as this Court renders a decision in *Wolman v. Essex*, case no. 76-496, which is presently pending before this Court. Therefore, plenary consideration of these provisions may either become unnecessary because of the decision in *Wolman v. Essex*, or at a minimum, should be reviewed by the District Court with regard to the specific regulations adopted by the Department of Education.

F. Summary.

Chapter 396 is a valid statutory program to correct a situation determined by the Minnesota Legislature to be inimical to the public welfare and legitimate means were chosen to accomplish the legislative goal. In light of this Court's prior decisions, no substantial federal question has been raised by this appeal and plenary consideration of this matter is unnecessary.

[25] Appellants' Jurisdictional Statement at A-5.

CONCLUSION

For the reasons set forth herein, this Court should grant appellees motion to dismiss this appeal, or, in the alternative, affirm the decision of the District Court.

Respectfully submitted,

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APPENDIX

CHAPTER THIRTY-SEVEN: EDU 740-759 INSTRUCTIONAL MATERIALS FOR PUPILS ATTENDING NONPUBLIC SCHOOLS (ALL NEW MATERIAL)

Edu 740 Policy

In order to promote equal educational opportunity for every school child in Minnesota and to assure all Minnesota pupils and their parents freedom of choice in education, the benefits provided by Minn. Laws 1975, Chapter 396 shall be made available to pupils in nonpublic schools as provided in this chapter.

Edu 741 Instructional Materials

(a) Eligible Instructional Materials.

(1) The term shall be limited to "textbooks," "school library and audiovisual materials," and "instructional supplies" as those terms or their equivalent are described or designated in the manual of instructions for uniform accounting for Minnesota school districts.

(aa) Textbooks include elementary and secondary textbooks furnished free to public school pupils including supplementary textbooks, and dictionaries. Textbooks are primarily for use in certain classes or grades rather than for general school use.

(bb) School library and audiovisual materials include materials such as school library books and pamphlets available for individual use by students; maps and globes for individual use; periodicals and newspapers for indi-

vidual use; audiovisual materials used in the instructional program such as films, filmstrips, recordings, exhibits, models, and television and radio teaching materials exclusive of equipment.

(cc) Instructional supplies are consumable items such as tests, chalk, paper, test tubes, ink, pencils, paint, paint brushes, crayons, chemicals, shop supplies for vocational education, oils, cleaners, instructional farming supplies, supplies for the operation of equipment used in the teaching-learning process, workbooks, physical education supplies, printing of classroom materials, and magazines or periodicals for individual use.

(2) Instructional materials must be secular, neutral, and nonideological such as the materials normally provided for pupils in public schools.

(b) Ineligible Instructional Materials.

Items such as unabridged dictionaries, encyclopedias, and other major reference works are classified as equipment and are therefore ineligible instructional materials.

Edu 742 General Administration

(a) The department of education shall administer funds allocated for the purchase of instructional materials to be loaned or provided to nonpublic school pupils.

(b) The department of education, in cooperation with the state auditor's office, shall establish proper accounting methods for fiscal control, fund accounting, and the

maintenance of records for the acquisition of instructional materials to be loaned or provided to nonpublic school pupils.

(c) The department of education's administrative costs shall not exceed two percent of the state allocation for instructional materials to be loaned or provided to nonpublic school pupils.

Edu 743 Local Administration

(a) An application for instructional materials to be loaned or provided shall be made by or on behalf of each participating nonpublic school pupil through the nonpublic school to the public school district in which the nonpublic school is located. For the 1975-76 year the application shall be made within 30 days of the effective date of these regulations. For the following school year it shall be made on or before September 15. The applications shall be on a form prescribed by the commissioner. Application forms shall be available in the office of the public school superintendent on the effective date of these regulations.

(b) The department of education shall determine the allocation of aid for instructional materials.

(c) The local school district shall purchase and transmit the instructional materials to the nonpublic schools in the district for distribution to the pupil applicants.

(d) Instructional materials loaned to pupils in nonpublic schools shall be maintained on inventory by the local school district except in cases of consumable or nonreusable instructional materials.

(e) The local school district may declare loaned school books unusable after five years and remove them from the inventory.

(f) The nonpublic school shall maintain on file all applications for instructional materials loaned or provided to nonpublic school pupils. The applications shall be available for inspection by the department of education.

(g) Upon completion of the distribution of the instructional materials each local school district may claim from the department of education (1) the cost of the instructional materials and (2) a sum for the actual cost of administration which shall not exceed five percent of the cost of the instructional materials distributed. The administrative costs shall be in addition to the allocation for the nonpublic school. Handling and shipping charges by the supplier shall be included in the allocation for each nonpublic school.

Edu 744 Availability of Funds

(a) The allocation for instructional materials shall be the total expenditure for instructional materials by all public school districts in the state divided by the total number of pupil units based on an unduplicated count of pupils enrolled in the districts during the same fiscal year.

(b) Kindergarten pupils shall be counted as one-half unit; elementary pupils (grades 1-6) shall be counted as one pupil unit and secondary pupils (grades 7-12) shall be counted as 1.4 pupil units notwithstanding the local nonpublic school organization.

(c) For the 1975-76 school year, the allocation shall not exceed $45.43 per nonpublic pupil unit. Future allocations will be based upon the most recent data available.

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